(27,016)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 325.

ALBERT J. BOTHWELL AND THE BOTHWELL COMPANY, A CORPORATION, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 Court of Claims.

No. 33077.

ALBERT J. BOTHWELL and THE BOTHWELL COMPANY, a Corporation,

vs.

THE UNITED STATES.

I. *History of Proceedings.*

The claimants filed their original petition herein June 7, 1915.

Subsequently, to wit, on June 9, 1915, the claimants filed, by leave of court, an amended petition.

On November 10, 1915 the defendants filed a demurrer to the claimants' petition.

On December 16, 1915 the demurrer was argued and submitted.

On January 10, 1916 the court filed an order sustaining the demurrer, with leave to the claimant to amend its petition as it may be advised within thirty (30) days from this date.

On February 5, 1916 the claimant filed its second amended petition, and on February 15, 1916 filed Exhibits A, B, C, D, E, F and G thereto.

Said amended petition with exhibits attached thereto are as follows:

2 II. *Second Amended Petition with Exhibits Attached.*

Filed February 5, 1916.

To the Honorable Chief Justice and the Associate Justices of the Court of Claims:

Your petitioners, Albert J. Bothwell, a resident of Natrona County, and the Bothwell Company, a corporation, doing business in the State of Wyoming, respectfully represent:

3 1. That in the month- of May, June and July, 1909, they were the owners of certain lands in townships 29 and 30 in range 84 and also of certain other lands in townships 29 and 30 in range 85, with the water rights and improvements thereon and of certain leasehold rights, water rights and improvements on land in section 36, township 30, range 85, all in Natrona County, in the State of Wyoming.

2. That petitioners at the time of the occurrences herein set forth were engaged in breeding pure-bred cattle on the lands aforesaid, which lands comprise in all a total of several thousands of acres of land in what was known as the Sweetwater Valley. That at the time

of said occurrences petitioners had upon said lands more than 500 tons of hay for the purpose of feeding to cattle, which said hay had been raised and also had been cut and stacked for some months prior to the month of May, 1909, for the purpose of feeding to the cattle plaintiffs were engaged in breeding. That said cattle consisted of about 500 head of pure-bred registered Hereford cattle and of about 500 head of pure-bred, but not registered, cattle, the whole constituting a part of a large breeding establishment which the petitioners for some years had been lawfully conducting upon the aforesaid lands owned by them.

That in the business of breeding pure-bred cattle it is necessary to keep the cattle in small herds in separate pastures, each herd consisting of cows bred to one particular bull and none other and to keep these herds separate and distinct each from the other during the whole of each year, and it is further necessary as a part of said business to have separate pastures and buildings for the accommodation of each herd and to have hay and grain therein and contiguous thereto.

4 3. That in and for a long time prior to the year 1909 the Government of the United States was in process of erection through the Reclamation Service of what is commonly known as the "Pathfinder Dam." That said dam was one of the incidents or requirements of a certain irrigation project known as the "North Platte Project," which said project, among other things, contemplated the impounding by means of the aforesaid Pathfinder Dam of the waters of the North Platte and Sweet Water Rivers. That on, to wit, the tenth day of May, 1909, the defendant hereto, the United States of America, filed a petition in the Circuit Court of the United States for the District of Wyoming seeking the condemnation in connection with the aforesaid irrigation project of the lands heretofore described of your petitioners and on which they were conducting the aforesaid breeding establishment. That in and by said petition the United States prayed for the appointment of three appraisers to ascertain the compensation to be paid to your petitioners for the taking of their lands and water-rights sought to be condemned and for the injuries affecting any other lands or improvements thereon of your petitioners by reason of the construction of the aforesaid North Platte Project. That the United States in and by said petition in one prayer thereof asked an order granting to it the immediate right to enter upon the lands and water-rights herein sought to be condemned, and, to use and occupy the same"; and that your petitioners be enjoined from interference with the United States or its agents in taking immediate possession and occupancy of the lands of your petitioners. That the United States at this time did not take any order granting it immediate right of entry on the lands of your

5 petitioners and enjoining petitioners from interference therewith as was required by the laws and judicial practice of the State of Wyoming and of the United States prior to entry on and taking possession of the lands of your petitioners. A true copy of said petition with the endorsements thereon is attached hereto marked petitioners' Exhibit A, and is prayed to be read as a part hereof the same as though incorporated herein. That your peti-

tioners and each of them, on, to wit, the thirty-first day of May, 1909, made separate answer to the condemnation proceedings or petition filed by the United States, said answers being identical save as one answer was a corporate answer and the other the answer of an individual. A true copy of said answers, except as one varied from the other as aforesaid, with the endorsements thereon, is attached hereto marked Petitioners' Exhibit B and is prayed to be read as a part hereof the same as though incorporated herein.

4. That on, to wit, the first day of June, 1909, application was made by the Government of the United States to the United States Judge for the District of Wyoming at Cheyenne in the State of Wyoming, for the appointment of three appraisers or commissioners to appraise the value of lands taken and to be taken from your petitioners by the Reclamation Service in connection with the aforesaid irrigation project. That on said first day of June, 1909, the United States Court aforesaid did pursuant to said application appoint three appraisers to ascertain and determine the compensation to be paid by the United States to your petitioners and the damage or injury to certain described lands and water-rights appurtenant thereto of your petitioners. That said appraisers were directed by the order of the court appointing them to hold their first meeting on the
6 eleventh day of June, 1909, and to make their assessment as aforesaid and certify the same to the court on or before the hirtieth day of June, 1909. That subsequently on, to wit, the eighth day of June, 1909, by a further order of the court one John Whitaker was appointed one of the appraisers aforesaid in the place and stead of one William R. Schnitger, one of the three appraisers first appointed, it being made to appear that said Schnitger was unable to act. A true copy of each of said orders with the endorsements thereon is attached hereto marked Exhibits C and D, respectively, and is prayed to be read as a part hereof the same as though incorporated herein.

5. That as your petitioners are informed and believe and therefore aver the appraisers met on the day named and proceeded expeditiously to view the land sought to be condemned, but the United States did not at this time, nor until the following month of July, seek an order authorizing the immediate entry on and taking of the lands aforesaid of your petitioners but nevertheless did proceed during the entire month of June, 1909, and beginning, as your petitioners are informed and believe and therefore aver, with the first day of June, 1909, to take the lands and improvements and the personal property of your petitioners therein and the business aforesaid of your petitioners by impounding the waters of the North Platte and the Sweetwater Rivers and diverted them from their natural courses and obstructed and impeded them in their flow and did cause them to overflow and to submerge rapidly the aforesaid lands, improvements and personal property, including the hay aforesaid of your petitioners, the United States in said impounding of waters taking possession of on or about the eleventh day of June, 1909, and
7 thereafter during said month of June, 1909, and converting to their own use not only the lands, improvements and tene-

ments of your petitioners, but also all the personal property thereon of your petitioners, including in said taking the hay aforesaid and the pure-bred cattle and breeding business of your petitioners, as will be more fully hereinafter set forth which said taking was completed and effected practically on or before the third day of July, 1909. That at no time at or after the institution of condemnation proceedings during said months of May, June or the early days of July, 1909, was any notice of any kind whatsoever served on your petitioners to remove their personal property, hay, cattle and breeding business from said lands and that the United States intended to and was about to submerge the same, and your petitioners had no means of preventing the taking as herein set forth of their hay, personal property, cattle breeding business and cattle as pure-bred cattle.

6. That so rapidly did the United States proceed to take the lands, tenements, personal property and business of your petitioners by submerging the same that before the appraisers appointed as aforesaid, could proceed to the land of your petitioners to view and appraise the same, which they did in the month of June, 1909, soon after appointment, the submergence of the same already had begun and when the appraisers viewed the lands and premises of your petitioners in the performance of their duties the said lands and improvements and personal property thereon were submerged in part by rapidly-rising waters, which waters continued to rise with exceptional rapidity throughout the month of June and to submerge the dwelling house and the several other buildings of your petitioners. That this

8 rapid submergence of the lands and other property of your petitioners was occasioned by the fact that the United States, its agents and its servants in the carrying out of the North Platte Project aforesaid had made provision for the escape through the Pathfinder Dam aforesaid of nine thousand cubic feet of water per second and had believed this provision was ample to care for all the volume of water that would flow down the Platte and Sweetwater Rivers without taking the property of your petitioners, but in the spring of 1909 a maximum of 26,000 cubic feet per second of water came down said rivers and as the waters rose they submerged the lands, improvements, tenements and personal property of your petitioners and the United States took and converted the same to their own use in the course of their attempted impounding of said waters aforesaid.

That on, to wit, the sixteenth day of June, 1909, the appraisers, otherwise known as commissioners, aforesaid made their report. A true copy of said report and the endorsements thereon is attached marked Exhibit E and is prayed to be read as a part hereof the same as though incorporated herein.

8. That in and by the statutes of the State of Wyoming in such cases made and provided it was enacted that the United States shall have the right to condemn land within the state for public use and by the statutes of the United States in such cases made and provided it was enacted that in condemnations of lands within the boundaries of any state the practice shall conform to the statutes and practice of the state the situs of such lands. That in and by the statutes of the State of Wyoming in force and effect throughout the months of May,

June and July, 1909, and of the practice of the courts of said state lawful entry on and possession of lands sought to be con-
9 demned could be made and had in advance of payment for the same and acquistion of title thereto only upon compliance with certain legal prerequisites, namely, the giving of a bond conditioned for the payment of such money compensation and costs as should be finally assessed in the condemnation proceedings and the taking of an order in such proceedings evidencing the final election of the condemning party, provided there existed the right of eminent domain, to acquire and appropriate the land involved and pay for the same and conferring upon the owner or other party or parties interested in said land the right to take charge of the condemnation proceedings and press them to an early final conclusion in the event of delay on the part of the condemning party. That the provision of the laws of the State of Wyoming governing such procedure are to be found in the Compiled Laws of the State of Wyoming and are as follows, so far as here pertinent and material.

Sec. 3884. On application made for that purpose to the court or judge, and on giving a bond in such amount, and with such sureties as shall be approved by the court or judge, conditioned for the payment of such condemnation money, compensation and costs, as shall be finally assessed and determined, such person, association of persons, company or corporation as herein mentioned, may enter upon and appropriate the property in question, and in such case all actions or proceedings against such person, association of persons, company or corporation on account thereof shall be stayed until such compensation is finally assessed and determined.

Sec. 3885. On complying with the provisions of the last section such person, association of persons, company or corporation may at any stage of any proceeding mentioned in this chapter ac-
10 quire the right to enter upon and appropriate the property in question; but after giving such bond and so entering into the possession of said property such person, association of persons, company or corporation cannot abandon or dismiss the proceedings and the owners of the land may have the proceedings brought to a final conclusion if the same shall be delayed by such person, association of persons, company or corporation so entering and appropriating such property.

That the United States did take and appropriate and convert to its own use the lands, improvements, personal property and breeding business of petitioners during the month of June, 1909, and from and after the eleventh day thereof without compliance with the statutes aforesaid and the practice of the state courts of Wyoming lawfully prescribed under such statutes and during the month of June and especially after the tenth day thereof submerged the property of petitioners without obtaining any order of court authorizing immediate entry thereon and without notice to your petitioners.

9. That on the third day of July, 1909, the taking of the lands, improvements, personal property and cattle business aforesaid of your petitioners was practically completely effected and a few days thereafter the rising of the impounded waters aforesaid had reached their very extreme height. That on the third day of July, 1909, the

United States which previous thereto as set forth herein had full notice and knowledge of the award made to your petitioners by the appraisers or commissioners aforesaid for the first time announced a decision to take by condemnation the lands of your petitioners and for the first time applied for the right to immediately enter upon, use and occupy the lands aforesaid of your petitioners as by the laws in such cases made and provided should precede the lawful right
11 so to enter upon, use and occupy said lands. A true copy of said application with the endorsements thereon is attached hereto marked Exhibit F and is prayed to be read as a part hereof the same as though incorporated herein. That in and by said application it was set forth and the fact so is that at this time, namely, the third day of July, 1909, the water impounded "is now so high that it covers and floods a large portion of the lands sought to be acquired by the plaintiff in this proceeding, and is gradually increasing in height, and covering more and more of said lands." That on the same day the application was filed, namely, the third day of July, 1909, the court applied to, the Circuit Court of the United States for the Eighth Judicial Circuit, District of Wyoming, did grant said application and for the first time authorized and empowered the United States, defendant hereto, to enter upon, use, occupy and appropriate all of the lands hereinbefore described," and directed by said order that said United States "shall not hereafter dismiss those proceedings, but it shall be lawful for the defendants to conduct the same to a final conclusion if the same shall be delayed by the plaintiff." A true copy of said order with the endorsements thereon is attached hereto marked Exhibit G, and is prayed to be read as a part hereof the same as though incorporated herein. That not until the signing of said order did the United States have a lawful right to enter upon, use, occupy and appropriate the lands of your petitioners and at and prior to the date of said order the lands of your petitioners already had been entered upon, used, occupied and appropriated as aforesaid by the defendant hereto, and the hay, personal property, cattle business and pure-bred cattle as such pure-bred cattle of your petitioners already had been taken, appropriated and converted to its own use by the defendant hereto.

12 10. That in the condemnation proceedings aforesaid a verdict and judgment was entered therein on the twenty-eighth day of December, 1909, in favor of your petitioners in the sum of $108,250 as the value of the lands of your petitioners so condemned. That in said proceedings your petitioners endeavored to have determined the matter of their rights arising out of the taking from them of the hay, the cattle and the business aforesaid, but the court held that in said proceedings it was without jurisdiction to consider anything other than the matter of the condemnation of the land itself and held that your petitioners would be compelled to apply for relief to this court. A true copy of said judgment with the endorsements thereon is attached hereto marked Exhibit H and is prayed to be read as a part hereof the same as though incorporated herein.

11. That in and during the month of June your petitioners had

upon said lands more than 500 tons of hay, all of which was taken from them and of the use of which they were deprived without their consent as aforesaid by the Government of the United States, which in the impounding of the said waters took possession of, appropriated and converted to its own use not only the lands aforesaid, but the hay aforesaid, which hay at the time of its destruction was of a current market value of $20 per ton, or a total for all of said hay of more than $10,000.

12. That at the time and by the same means hereinbefore set forth the Government of the United States took from these petitioners their breeding business from which they had been theretofore and at that time were in receipt of large gains and emoluments, and deprived them of the beneficial right, use and enjoyment of their herd of approximately 500 head of registered cattle of the average
13 value of $100 per head and of approximately 500 head of pure-bred, but unregistered, cattle of the average of $80 per head, and compelled petitioners in order to avert total loss of the said cattle and to protect themselves from loss as far as they could to drive them hurriedly from the lands aforesaid and sell them as common cattle for what they would bring, which said price realized by your petitioners was only an average of $30 per head, making a total loss to your petitioners by reason of the taking as aforesaid of the value of their cattle as cattle of pure breed of the sum of $95,000, and also took from your petitioners the value of their lands, improvements, personal property and herds as a going business for the breeding of fine cattle to the loss to your petitioners to the amount of twenty thousand dollars. That at this time there were no other lands within a reasonable distance in the State of Wyoming which your petitioners could use and occupy and which could be adapted on short notice to the maintenance of a pure-bred cattle breeding business and no means whereby your petitioners in the usual pursuit of said business could keep and maintain the same in existence under the then existing circumstances and conditions.

Recapitulation.

For the taking of the hay of your petitioners.....	$10,000.00
For the taking from your petitioners of the value of their said herds of cattle as pure-bred cattle.....	95,000.00
For the taking from your petitioners of their business as breeders and sellers of pure-bred cattle.....	20,000.00
Total	$125,000.00

14 Wherefore, and by reason of the premises aforesaid, the petitioners sue the United States of America for an accounting for the taking of their property without due process of law, and claim of and from the United States recovery in the sum of $125,000 or such other sum as upon a full and final accounting shall be found due by the United States of America to your petitioners for property

of your petitioners taken from them by the said defendant and not paid for.

ALBERT J. BOTHWELL,
THE BOTHWELL COMPANY,
By A. J. BOTHWELL (*President*),
Petitioners.

By their Attorneys:
C. E. BRECKONS.
C. H. MERILLAT.

Notary's Certificate.

COUNTY OF LOS ANGELES,
State of California, ss:

Albert J. Bothwell, being first duly sworn, deposes and says: That he is one of the petitioners in the above-entitled cause, and is the President of the Bothwell Company, a corporation, the other of petitioners in said cause; that he has read the foregoing petition by him subscribed and knows the contents thereof; and that he believes all facts stated in the foregoing petition to be true to the best of his knowledge, information and belief and that he is advised that he has a right of recovery against the Government of the United States for all or part of the matters and things therein set forth.

——— ———.

Subscribed and sworn to before me this 24th day of January, 1916.

[SEAL.] GERTRUDE P. PETERS,
Notary Public.

15 EXHIBIT "A."

In the Circuit Court of the United States for the Eighth Judicial Circuit, District of Wyoming.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BOTHWELL COMPANY, a Corporation; ALBERT J. BOTHWELL and Margaretta Gray Bothwell, His Wife, and The Stockgrowers' National Bank of Cheyenne, Wyoming, a Corporation, Defendants.

Bill of Complaint.

Comes now the United States of America by Timothy F. Burke, its Attorney for the District of Wyoming, and by Gibson Clark, William A. Riner and John D. Clark, Special Assistants to said United States District Attorney, acting under and pursuant to instructions from the Attorney General of the United States upon the request

of the Secretary of the Interior in this behalf given and made, and shows to the Court:

1. That said defendant, The Bothwell Company, is a corporation duly organized and existing under the laws of the State of
16 Wyoming, and claims to be the owner of portions of the lands and water rights hereinafter described.

That the said defendant, Albert J. Bothwell, claims to be the owner of portions of said lands and water rights hereinafter described.

That the said The Stockgrowers National Bank of Cheyenne, Wyoming, is a corporation organized and existing under the laws of the United States, and claims to be the owner and holder of two certain mortgages covering the lands hereinafter described.

2. That the plaintiff, in pursuance of the Act of Congress approved June 17, 1902, commonly known as the Reclamation Act, is now constructing, and for a long time prior to this time has been engaged in the construction of certain irrigation works known as the North Platte Project, taking water for the irrigation and reclamation of about four hundred thousand acres of plaintiffs' public lands situate in the valley of the North Platte River in the States of Wyoming and Nebraska, from the flood waters of the North Platte and Sweetwater Rivers; that said irrigation works include a certain dam and auxiliary works, known as the Pathfinder Dam situate in the County of Natrona, in the State of Wyoming, on the line between Sections twenty-three (23) and twenty-four (24) in Township twenty-nine (29) North, of Range eighty-four (84) West of the Sixth Principal Meridian, at a point across a deep canon through which the said North Platte River flows, and, which when completed will create and establish a reservoir necessary for the operation of said North Platte Project and for the storage of the waters of said North Platte and Sweetwater Rivers for the irrigation of said public lands of the plaintiff; that said dam will be completed during the early
17 summer of the present year at a cost to this plaintiff of One Million five hundred thousand dollars, and will be two hundred and fifteen (215) feet in height above the bed rock of said rivers, and will hold back the waters of said rivers and causing the level thereof to rise two hundred feet or more above the normal level of said streams will submerge and overflow many thousands of acres of the land in the valleys of said rivers, including all the lands hereinafter described; that the reservoir to be created by said dam will have a storage capacity of One Million twenty five thousand (1,025,000) acre feet of water, and is necessary for the storage thereof for use in the irrigation and reclamation of said four hundred thousand acres of the public lands of the plaintiff, and for the operation and conduct of said Project; that all of the lands hereinafter described lie within the exterior limits of said reservoir and all thereof will be submerged by the waters to be stored and impounded therein when said dam is completed as aforesaid.

That the plaintiff, in pursuance of and in carrying out its said project, has already entered into contracts with numerous settlers who have made entry and settlement on public lands along the valley of said North Platte River, to furnish them water for the purpose

of the irrigation and reclamation of the lands so entered and settled upon by them, and is under obligation to furnish them with such water during the irrigation season of the year 1909 and thereafter, and in order to carry out its obligation to such settlers in accordance with the provisions of the said Reclamation Act, and in order that it may carry out and operate its said project and reclaim said public lands of plaintiff, pursuant to the provisions of said Act, it is
18 necessary that said plaintiff should acquire title and ownership in, and the right to use, occupy and appropriate all the lands and water rights pertaining thereto hereinafter described and claimed to be owned by said defendants.

That plaintiff has endeavored to purchase said lands and water rights from said defendants, and to settle with them for all such damages as they or either of them may sustain by reason of the construction of said dam and the creation of said reservoir, and the use and occupation thereof for the purpose aforesaid, but has been wholly unable either to purchase said lands or to make such settlement, and the compensation to be paid for the taking or injuriously affecting such property has not been agreed upon by the parties hereto.

That the property claimed by said The Bothwell Company, to be owned by it and which is needed by this plaintiff for the purposes aforesaid is situate in the County of Natrona in the State of Wyoming, and is described as follows, to-wit:

Situate in Township Twenty-nine North, Range Eighty-four West, 6th P. M.—Lots Three and Four of Section Six (6).

Situate in Township Thirty North, of Range Eighty-four West, 6th P. M.—An undivided one-half interest in Lots One, Two, Three and Four and the East Half of the Southwest Quarter of Section Thirty-one (31).

Situate in Township Twenty-nine North of Range Eighty-five West, 6th P. M.—Lots One, Three and Four and South Half of Northwest Quarter of Section One (1). Lots One, Two, Three and Four of Section Two (2). The North Half of Section Three (3). The South Half of Northeast Quarter and the Northwest Quarter of Section Four (4). The Northeast Quarter of Section Five (5).
19 Situate in Township Thirty North, of Range Eighty-five West, 6th P. M.—The South Half—the south half of the Northeast Quarter and the Northwest Quarter of the Northeast Quarter of Section Thirty-four (34). The Southwest Quarter of the Southeast Quarter of Section Twenty-seven (27). The South Half of Section Thirty-five (35).

Together with all water rights appurtenant to said lands or any of them, so as aforesaid claimed by said The Bothwell Company.

That said The Bothwell Company claims some interest in and to the Southwest Quarter of the Southeast Quarter; the South Half of the Southwest Quarter of Section Five (5); the Southeast Quarter of the Southeast Quarter of Section Six (6); the Northeast Quarter of the Northeast Quarter of Section Seven (7); the North Half of the Northwest Quarter and the Northwest Quarter of the Northeast Quarter of Section Eight (8), all being in Township Twenty-nine (29) North of Range Eighty-four (84) West of the Sixth Principal Meridian, in said County of Natrona; arising as follows: The said

lands were entered at the Douglas, Wyoming, United States Land Office on the 3rd day of June, A. D. 1902, under the Desert Land Laws of plaintiff, by one Florence Kelly, as Desert Land Entry Number 864, and thereafter on the 8th day of May A. D. 1903, said Florence Kelly made final proof thereof purporting to show that all the requirements of the said Desert Land Laws had been fully complied with in good faith in respect to said entry, and therefore Final Certificate Number 199 was issued to her by the Register and Receiver of said land office, and thereafter on the 13th day of May A. D. 1903, said Florence Kelly by her Warranty Deed conveyed said land to one Albert J. Bothwell, and thereafter said Bothwell by his Warranty Deed, executed and dated on February 1, A. D. 1904, conveyed said land with all water rights appurtenant thereto, to said The Bothwell Company.

Plaintiff avers on information and belief that said final proofs were false and fraudulent in this to-wit: That at the date thereof the said land had not been reclaimed; that no part of said land at said date, had been cultivated; that no part of said land had been irrigated in good faith; that the said entry was originally made on behalf of and for the use and benefit of said Albert J. Bothwell and not for the use and benefit of said Florence Kelly. And said entry and all thereof has been held for cancellation and is now under investigation by plaintiff's Department of the Interior.

That the property claimed by said Albert J. Bothwell to be owned by him, and which is needed by plaintiff for the purposes aforesaid, is situate in the said County of Natrona and is described as follows, to-wit:

Situate in Township Twenty-nine North, of Range Eighty-five West, 6th P. M.—Lot Two and the Southwest Quarter of the Northeast Quarter of Section One (1). The South Half of the North Half of Section Two (2).

Situate in Township Thirty North, of Range Eighty-four West, 6th P. M.—An undivided One-half interest in and to Lots One, Two, Three and Four and the East Half of the Southwest Quarter of Section Thirty-one (31).

Together with all water rights appurtenant to said lands or any of them, so as aforesaid claimed to be owned by said Albert J. Bothwell.

Situate in Township Thirty North, of Range Eighty-five West, 6th P. M.—A leasehold estate in and to the South Half of Section Thirty-six (36), and in and to all water rights appurtenant thereto, and which he, the said Albert J. Bothwell, acquired by a lease from the State of Wyoming, dated April 8th, A. D. 1907, and being for the term of five years from said date, with the right of renewal for a further period of five years.

That the said Stockgrowers National Bank claims an interest as mortgagee in all of the lands and water rights hereinbefore mentioned, by virtue of a certain mortgage made and executed on the 26th day of February, A. D. 1909, by said The Bothwell Company to one A. J. Bothwell, and on said day duly assigned by said A. J. Bothwell to said Bank, which said mortgage is of record at page 36 of Book 6 of Mortgages in the office of the County Clerk of said

County of Natrona, and which said assignment is of record at pag
84 of Book 5 of Mortgages in said office.

And said Bank also claims an interest in all of said lands and
water rights as the assignee of a certain other mortgage made and
executed on the 6th day of November, A. D. 1903, by said The Both
well Company to one John C. Davis, which said mortgage was on th
2nd day of November, A. D. 1906, duly assigned by said John C
Davis to said The Stockgrowers National Bank—said mortgage being
of record at page 146 of Book 3 of Mortgages in the office of said
County Clerk—said assignment not having been placed on record.

Plaintiff further avers on information and belief, that Margarett
Gray Bothwell is the wife of said Albert J. Bothwell, and as such
claims some interest under the homestead laws of the State o
22 Wyoming, in and to the Southeast Quarter of said Section
Thirty-four (34) in Township Thirty North of Range
Eighty-five West of the Sixth Principal Meridian, in said County o
Natrona.

That so far as plaintiff is informed and believes and so far a
plaintiff has been able to ascertain there are no other persons having
or claiming any interest, legal or equitable, in the property herein
before described, than those persons mentioned and named herein.

Wherefore, plaintiff prays that this court appoint three suitable
persons, whose duty it shall be to ascertain and appraise the compen-
sation to be paid to the said defendants, respectively, for the taking
of their respective lands and water rights herein sought to be con-
demned, and for the injuries affecting, if at all, any other lands or
properties of the defendants, respectively, and to determine the
price, or prices, respectively, to be paid for each, together with the in-
jury to any other lands or improvements of said defendants, by rea-
son of the construction and maintenance of its said project, as herein
described, and to make due report of their proceedings as required by
law; and that this court thereupon make an entry upon its record in
relation to the payment by the said plaintiff of the award, or awards,
so found, and upon the award, or awards, being paid, that it do cause
to be made upon its record its rule and order condemning and grant-
ing to the plaintiff in fee simple the said lands and water rights, for
the uses and purposes of the plaintiff as hereinbefore described; and
for such other and further relief as said plaintiff may be entitled to
in the premises under the law.

Plaintiff further prays for an order granting to plaintiff, its agents,
employees and servants, the immediate right to enter upon
23 the lands and water rights herein sought to be condemned,
and to use and occupy the same for the purposes hereinbefore
stated, and that the said defendants, their agents, employees and serv-
ants be enjoined from in any way interfering with the plaintiff, its
agents, employees and servants, from so doing.

TIMOTHY F. BURKE,
United States Attorney for the District of Wyoming.
GIBSON CLARK,
WILLIAM A. RINER,
JOHN D. CLARK,
Special Assistants to the United States Attorney.

STATE OF WYOMING,
County of Laramie, ss:

Gibson Clark being first duly sworn upon his oath says, I am one of the Attorneys for the plaintiff named in the foregoing Bill of Complaint; I have read the said Bill of Complaint and know the contents thereof, and the matters stated are true as I verily believe.

GIBSON CLARK.

Subscribed and sworn to before me this 10th day of May, A. D. 1909.

[SEAL.]

LOUIS KIRK,
Clerk of the United States Circuit Court for the District of Wyoming,
By CHARLES J. OHNHAUS, *Deputy.*

24 Endorsements: 452. In the Circuit Court of the United States for the Eighth Judicial Circuit, District of Wyoming. The United States of America, Plaintiff, vs. The Bothwell Company, a Corporation, Albert J. Bothwell and Margaretta Gray Bothwell, his Wife, and the Stockgrowers National Bank of Cheyenne, Wyoming, a Corporation, Defendants. Bill of Complaint. Filed May 10, 1909. Louis Kirk, Clerk. By Charles J. Ohnhaus, Deputy. Timothy F. Burke, U. S. Dist. Attorney. Gibson Clark, William A. Riner, and John D. Clark, Special Assistants to U. S. Dist. Atty., Attorneys for Plaintiff.

25 EXHIBIT "B."

In the Circuit Court of the United States for the Eighth Judicial Circuit, District of Wyoming.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BOTHWELL COMPANY, a Corporation; ALBERT J. BOTHWELL and Margaretta Gray Bothwell, His Wife, and The Stockgrowers' National Bank of Cheyenne, Wyoming, a Corporation, Defendants.

Separate Answer of the Defendant The Bothwell Company.

Comes now the said defendant, The Bothwell Company, and for its answer to the bill of complaint in said cause, admits that this defendant is a corporation duly organized and existing under the laws of the State of Wyoming, and admits and avers that this defendant is the owner of the following real estate in the County of Natrona, in the State of Wyoming, to-wit:

Lots Three and Four of Section Six (6) in Township Twenty-nine North, Range Eighty-four (84) West of the Sixth Principal Meridian;

26 An undivided one-half interest in Lots One (1), Two (2), Three (3) and Four (4) and the East Half of the Southwest Quarter of Section Thirty-one (31), in Township Thirty (30) North of Range Eighty-four (84) West of the Sixth Principal Meridian;

Lots One (1), Three (3) and Four (4) and South Half of Northwest Quarter of Section One (1), Lots one (1), Two (2), Three (3) and Four (4) of Section Two (2), the North Half of Section Three (3), the South Half of Northeast Quarter and the Northwest Quarter of Section Four (4), the Northeast Quarter of Section Five (5) in Township Twenty-nine (29) North of Range Eighty-five (85) West of the Sixth Principal Meridian;

The South Half, the South Half of the Northeast Quarter and the Northwest Quarter of the Northeast Quarter of Section Thirty-four (34), the Southwest Quarter of the Southeast Quarter of Section Twenty-seven (27), the South Half of Section Thirty-five (35) in Township Thirty (30) North of Range Eighty-five (85) West of the Sixth Principal Meridian;

The Southwest Quarter of the Southeast Quarter; the South Half of the Southwest Quarter of Section Five (5); the Southeast Quarter of the Southeast Quarter of Section Six (6); the Northeast Quarter of the Northeast Quarter of Section Seven (7); the North Half of the Northwest Quarter and the Northwest Quarter of the Northeast Quarter of Section Eight (8), all being in Township Twenty-nine (29) North of Range Eighty-four (84) West of the Sixth Principal Meridian;

Lot Two (2) and the Southwest Quarter of the Northeast Quarter of Section One (1), the South Half of the North Half of Sec-

27 tion Two (2), in Township Twenty-nine (29) North of Range Eighty-five (85) West of the Sixth Principal Meridian;

The remaining undivided One-half interest in and to Lots One (1), Two (2), Three (3) and Four (4) and the East Half of the Southwest Quarter of Section Thirty-one (31), in Township Thirty (30) North of Range Eighty-four (84) West of the Sixth Principal Meridian; thus constituting all interests in said lands.

A leasehold estate in and to the South Half of Section Thirty-six (36) in Township Thirty (30) North of Range Eighty-five (85) West of the Sixth Principal Meridian;

The West Half of the Southeast Quarter of Section Thirty-one (31) in Township Thirty (30) North of Range Eighty-four (84) West of the Sixth Principal Meridian;

The South Half of the Northeast Quarter and North Half of the Southeast Quarter of Section Twenty-one (21), and the Southeast Quarter of the Northwest Quarter of Section Twenty-two (22) in Township Thirty (30) North of Range Eighty-five (85) West of the Sixth Principal Meridian;

The South Half of the Southeast Quarter of Section Twenty-two (22) and the North Half of the Northeast Quarter of Section Twenty-seven (27) in Township Thirty (30) North of Range Eighty-five (85) West of the Sixth Principal Meridian;

The Northeast Quarter of the Northwest Quarter of Section

Twenty-five (25) in Township Twenty-nine (29) North of Range Eighty-six (86) West of the Sixth Principal Meridian;

The Southeast Quarter of the Northeast Quarter of Section
28 Thirty-two (32), the South Half of the North Half of Section Thirty-three (33), the South Half of the Northwest Quarter and the Southwest Quarter of the Northeast Quarter of Section Thirty-four (34) in Township Twenty-nine (29) North of Range Eighty-five (85) West of the Sixth Principal Meridian. Together with all water rights appurtenant to said lands and every portion thereof.

And upon information and belief this defendant denies that the defendant, Margaretta Gray Bothwell, has any title to or interest of any kind in the said real estate or any of it; and upon the like information and belief the defendant denies that the final proofs of Florence Kelly upon the lands alleged to have been entered by her in Section Eight (8) in Township Twenty-nine (29) North, Range Eighty-four (84) West were in any wise false or fraudulent.

And this defendant admits that the plaintiff is now constructing and for a long time hitherto has been engaged in the construction of certain irrigation works known as the North Platte Project, taking water for the irrigation and reclamation of about four hundred thousand acres of the public lands of the plaintiff situated in the valley of the North Platte River, in the States of Wyoming and Nebraska, from the waters of the North Platte and Sweetwater Rivers; that the said irrigation works include a certain dam and auxiliary works known as the Pathfinder Dam situated in the County of Natrona, in the State of Wyoming, on the line between Sections Twenty-three (23) and Twenty-four (24), in Township Twenty-nine (29) North of Range Eighty-four (84) West of the Sixth Principal Meridian, at a point across a deep canon through which the North Platte River flows, and, which, when completed, will create and establish
29 a reservoir necessary for the operation of said North Platte Project and for the storage of the waters of said North Platte and Sweetwater Rivers for the irrigation of the public lands of the plaintiff; that said dam will be completed during the early summer of the present year at a cost to the plaintiff of more than a million dollars, and will be two hundred and fifteen (215) feet in height above the bed rock of said rivers, and will hold back the waters of said rivers, causing the level thereof to raise two hundred feet or more above the normal level of said streams and will submerge and overflow many thousands of acres of lands in the valleys of said rivers, including all the lands described in the plaintiff's bill of complaint; that the said reservoir will have a storage capacity of about 1,025,000 acre feet of water, and is necessary for the storage thereof for use in the irrigation and reclamation of said four hundred thousand acres of the public lands of the plaintiff, and for the operation and conduct of said project; that all of the lands described in the said bill of complaint lie within the exterior limits of said reservoir, and all thereof will be submerged by the waters to be stored and impounded therein when said dam is completed.

And this defendant avers that in addition to the lands described in the said bill of complaint as taken and submerged by the construc-

tion of said dam, the following lands belonging to this defendant will be rendered valueless by the construction of the said dam and the impounding of the waters as intended by the plaintiff and as is more particularly set out in the bill of complaint, to-wit:

The West Half of the Southeast Quarter of Section Thirty-one (31) in Township Thirty (30) North of Range Eighty-four (84)
30 West; the South Half of the Northeast Quarter and the North Half of the Southeast Quarter of Section Twenty-one (21) and the Southwest Quarter of the Northwest Quarter of Section Twenty-two (22), and the South Half of the Southeast Quarter of Section Twenty-two (22) and the North Half of the Northeast Quarter of Section Twenty-seven (27) in Township Thirty (30) North of Range Eighty-five (85) West; the Northeast Quarter of the Northwest Quarter of Section Twenty-five (25) in Township Twenty-nine (29) North of Range Eighty-six (86) West; the Southeast Quarter of the Northeast Quarter of Section Thirty-two (32), the South Half of the North Half of Section Thirty-three (33) and the South Half of the Northwest Quarter and the Southwest Quarter of the Northeast Quarter of Section Thirty-four (34) in Township Twenty-nine (29) North of Range Eighty-five (85) West of the Sixth Principal Meridian, together with the water rights appurtenant to said lands.

Wherefore, this defendant prays that it may be allowed not only the reasonable value of the lands taken by the plaintiff as set forth in the bill of complaint, but also such damages as may be by it sustained to its said other lands on account of the taking and submerging of the lands described in the bill of complaint, and also on account of the submerging and otherwise rendering valueless the said additional lands, and defendant prays for any and all other relief as may be deemed just and right in the premises.

____ ____,
____ ____,
Attorneys for the Defendant The Bothwell Company.

31 STATE OF WYOMING,
County of Laramie, ss:

Albert J. Bothwell, being duly sworn on his oath according to law, deposes and says, that he is President of the defendant, The Bothwell Company; that he has read the foregoing answer and verily believes that the facts therein set forth are true.

ALBERT J. BOTHWELL.

Subscribed in my presence and sworn to before me this 31st day of May, A. D. 1909.

[SEAL.] JENNIE M. TUPPER,
Notary Public.

32 EXHIBIT "C."

In the Circuit Court of the United States for the Eighth Judicial Circuit, District of Wyoming.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BOTHWELL COMPANY, a Corporation; ALBERT J. BOTHWELL and Margaretta Gray Bothwell, His Wife, and The Stockgrowers' National Bank of Cheyenne, Wyoming, a Corporation, Defendants.

Order Appointing Commissioners.

Now on this 1st day of June, A. D. 1909, this matter comes on for hearing upon the petition of the plaintiff, the separate answers of said defendants, The Bothwell Company, Albert J. Bothwell and The Stockgrowers National Bank, the said plaintiff appearing by Timothy F. Burke, District Attorney, and Gibson Clark, William A. R[illegible]er and John D. Clark, Special Assistants to said District Attorney, and the said above named defendants appearing by Herbert V. Lacey and John W. Lacey, their Attorney, and it is made to

33 appear to the Court by the return of the Marshal of this District, that Margaretta Gray Bothwell was duly served on the 12th day of May, 1909, with notice of plaintiff's intention to apply to this Court on this day for the appointment of Commissioners as prayed for in its said petition, and this matter is submitted to the Court:

The Court finds that a necessity exists for the acquisition by the plaintiff of title to the lands described in petition for use by it as a reservoir in connection with the North Platte Reclamation Project as set forth in its said petition; that plaintiffs and said defendants have been unable to agree upon the price to be paid therefor, and it has become necessary for the institution of these proceedings.

Wherefore, it is now considered and ordered by the Court that C. H. Townsend and A. J. Cunningham, both impartial freeholders of the County of Natrona in the State of Wyoming, and William R. Schnitger, an impartial freeholder of the County of Laramie in the State of Wyoming (to whose appointment all objections because of residence are now waived by the parties hereto) be and they hereby are appointed commissioners to ascertain and determine the compensation to be paid by plaintiff to the owners and all persons interested therein for the taking of the following described lands, to-wit:

In Township 29 North of Range 84 West:—Lots 3 and 4 of Section Six (6);

In Township 29 North of Range 85 West:—The North Half of the North Half of the South Half of the Northwest Quarter and the Southwest Quarter of the Northeast Quarter of Section One (1); the North Half of Section Two (2); the North Half of Section Three

(3); the South Half of the North Half and the North Half
34 of the Northwest Quarter of Section Four (4); the Northeast Quarter of Section Five (5);

In Township 30 North of Range 84 West:—Lots 1, 2, 3 and 4 and the East Half of the Southwest Quarter of Section Thirty-one (31)

In Township 30 North of Range 85 West:—The South Half, the South Half of the Northeast Quarter, and the Northwest Quarter of the Northeast Quarter of Section Thirty-four (34); the Southwest Quarter of the Southeast Quarter of Section Twenty-seven (27); the South Half of Section Thirty-five (35);

Together with all water rights appurtenant to said lands; a leasehold interest from this date until April 8th, 1912, with a right of renewal for an additional period of five years in and to the South Half of Section Thirty-six (36), together with all water rights appurtenant thereto.

And if the said commissioners shall find that the taking and appropriation of the above described lands will damage or injuriously affect any of the following described lands, to-wit:

Parcel No. 1. The South Half of the Northeast Quarter and the North Half of the Southeast Quarter of Section Twenty-one (21), and the Southwest Quarter of the Northwest Quarter of Section Twenty-two (22) in Township 30 North of Range 85 West.

Parcel No. 2. The South Half of the Southeast Quarter of Section Twenty-two (22) and the North Half of the Northeast Quarter of Section Twenty-seven (27) in Township 30 North of Range 85 West.

Parcel No. 3. The West Half of the Southeast Quarter of Section Thirty-one in Township 30 North of Range 84 west.

35 Parcel No. 4. The Southeast Quarter of the Northeast Quarter of Section Thirty-two (32), the South Half of the North Half of Section Thirty-three (33) and the South Half of the Northwest Quarter and the Southwest Quarter of the Northeast Quarter of Section Thirty-four (34) in Township 29 North of Range 85 West.

Parcel No. 5. The Northeast Quarter of the Northwest Quarter of Section Twenty-five (25) in Township 29 North of Range 86 West; then and in such case to ascertain and determine the compensation to be paid to the owners and other persons interested therein for and on account of such damage to each parcel thereof.

And further to ascertain and determine separately the value of the following described lands and the value of the water rights appurtenant thereto, to-wit: The Southwest Quarter of the Southeast Quarter, the South Half of the Southwest Quarter of Section Five (5), the Southeast Quarter of the Southeast Quarter of Section Six (6), the Northeast Quarter of the Northeast Quarter of Section Seven (7), and the North Half of the Northwest Quarter and the Northwest Quarter of the Northeast Quarter of Section Eight (8), in Township 29 North of Range 84 West, and the compensation to be paid to the owners and other persons interested therein for the taking thereof and for the damaging and injuriously affecting because of such taking, if any such damage there be, all or any of the five parcels of land above described.

Said commissioners are hereby ordered to proceed to make said ascertainment and assessment and to certify the same to this Court on or before the 30th day of June, A. D. 1909, and to hold their first meeting at the office of the Clerk of the District Court of the County of Natrona, State of Wyoming, on the eleventh day of June,
36 A. D. 1909, in which said county all of the hereinbefore described lands are situate.

Done in open Court this first day of June, A. D. 1909.

JOHN A. RINER, *Judge.*

O. K.
J. W. L.

EXHIBIT "D."

In the Circuit Court of the United States for the Eighth Judicial Circuit, District of Wyoming.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BOTHWELL COMPANY, a Corporation; ALBERT J. BOTHWELL and Margaretta Gray Bothwell, His Wife, and The Stockgrowers' National Bank of Cheyenne, Wyoming, a Corporation, Respondents.

Order Appointing Commissioner.

This matter came on to be heard this day, the Government being represented by Judge Gibson Clark, and the respondents
37 being represented by Judge John W. Lacey, and it being made to appear to the Court that William R. Schnitger, one of the appraisers appointed in the above entitled case on the first day of June, A. D. 1909, is unable to act; therefore, it is now ordered by the Court that John Whitaker, an impartial freeholder of Laramie County in the State of Wyoming (whose appointment is consented to by Judge Gibson Clark, representing the United States, and Judge John W. Lacey, representing all of the respondents) be, and he is hereby appointed a commissioner to act with C. H. Townsend and A. J. Cunningham, heretofore appointed on the first day of June, A. D. 1909, to ascertain and determine the compensation to be paid by the United States to the owners and all persons interested therein, for the taking of the lands described in the order heretofore entered herein, on the first day of June, A. D. 1909, and said Commissioner, John Whitaker, to the subject in all other respects to the directions contained in said order of June 1st, A. D. 1909.

JOHN A. RINER, *Judge.*

38 EXHIBIT "E."

In the Circuit Court of the United States for the Eighth Judicial Circuit, District of Wyoming.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BOTHWELL COMPANY, a Corporation; ALBERT J. BOTHWELL and Margaretta Gray Bothwell, His Wife, and The Stockgrowers' National Bank of Cheyenne, Wyoming, a Corporation, Defendants.

Report of Commissioners.

We, the undersigned, the Commissioners heretofore, to-wit: on the 1st and 8th days of June, A. D. 1909, appointed by the Circuit Court of the United States for the District of Wyoming, in the above entitled cause, do hereby report and certify that on the 11th day of June, A. D. 1909, we met pursuant to the terms of the order of our appointment at the office of the Clerk of the District Court of the County of Natrona, State of Wyoming, in the town of Casper, and that then and there before Frank H. Sawyer, County Clerk, we were each duly sworn to faithfully and impartially discharge our
39 duties as such Commissioners, and to carefully view and inspect the real estate described in the said order of appointment; and ascertain and appraise the compensation to be paid to the owners and persons interested in the said lands, by the plaintiff herein, for the taking of or injuriously affecting the lands described and mentioned in said order, and water rights appurtenant thereto.

That thereafter we carefully viewed and inspected said premises and now being duly advised in the matter we make the following ascertainment and assessment:

I.

As to the first description of lands taken, being the following lands in the County of Natrona, in the State of Wyoming, to-wit:

In Township 29 North of Range 84 West:—Lots 3 and 4 of Section Six (6);

In Township 29 North of Range 85 West:—The North Half of the North Half and the South Half of the Northwest Quarter and the Southwest Quarter of the Northeast Quarter of Section One (1); the North Half of Section Two (2); the North Half of Section Three (3); the South Half of the North Half of the North Half of the Northwest Quarter of Section Four (4); the Northeast Quarter of Section Five (5);

In Township 30 North of Range 84 West:—Lots 1, 2, 3 and 4 and the East Half of the Southwest Quarter of Section Thirty-one (31);

In Township 30 North of Range 85 West:—The South Half, the South Half of the Northeast Quarter, and the Northwest Quarter of

the Northeast Quarter of Section Thirty-four (34); the
40 Southwest Quarter of the Southeast Quarter of Section Twenty-seven (27); the South Half of Section Thirty-five (35);

Together with all water rights appurtenant to said lands; a leasehold interest from this date until April 8th, 1912, with a right of renewal for an additional period of five years in and to the South Half of Section Thirty-six (36), together with all water rights appurtenant thereto.

We hereby fix, ascertain and determine the compensation to be paid by the plaintiff to the owners and all persons interested in the lands aforesaid for the taking of the same the sum of $176,930—One hundred seventy-six thousand nine hundred thirty Dollars, and we do certify that all of the above described land and property is necessary for use by the United States as a Reservoir site in connection with its North Platte Reclamation Project.

II.

As to the second parcel of lands and which by the order of the Court we are directed to ascertain and determine separately, the value of the lands and the value of the water rights, being the following lands in said County of Natrona, to-wit:

The Southwest Quarter of the Southeast Quarter, the South Half of the Southwest Quarter of Section Five (5), the Southeast Quarter of the Southeast Quarter of Section Six (6), the Northeast Quarter of the Northeast Quarter of Section Seven (7), and the North Half of the Northwest Quarter and the Northwest Quarter of the Northeast Quarter of Section Eight (8), in Township 29 North of Range 84 West; and the water rights appurtenant thereto; we do
41 hereby fix, ascertain and determine the compensation to be paid — the plaintiff to the owners and all persons interested therein for the taking of the said lands, the sum of $16,000—Sixteen thousand Dollars, and for the taking of the water rights appur-

If title is perfected, if not this is to be left out entirely.

tenant to said lands the sum of — Dollars, and we do certify that all of said lands and property last above described are also necessary for use by the United States as a reservoir site in connection with its said North Platte Reclamation Project.

III.

And we hereby fix, ascertain and determine that the taking of the lands above described under number "I" will damage and injuriously affect such of the lands we hereinafter describe as have amounts indicating damage set opposite them, and we fix, ascertain and determine the compensation to be paid to the owners and other persons interested in said lands situate in said county and next hereinafter described for and on account of such damage the amount set opposite each parcel as follows, to-wit:

On Parcel No. 1, being the South Half of the Northeast Quarter and the North Half of the Southeast Quarter of Section Twenty-one (21), and the Southwest Quarter of the Northwest Quarter of Section Twenty-two (22) in Township 30 North of Range 85 West, the sum of $— No No Dollars.

On Parcel No. 2, being the South Half of the Southeast Quarter of Section Twenty-two (22) and the North Half of the Northeast Quarter of Section Twenty-seven (27) in Township 30 North of Range 85 West, the sum of — No Dollars.

42 On Parcel No. 3, being the West Half of the Southeast Quarter of Section Thirty-one in Township 30 North of Range 84 West, the sum of $960 Nine hundred and sixty Dollars.

On Parcel No. 4, being the Southeast Quarter of the Northeast Quarter of Section Thirty-two (32), the South Half of the North Half of Section Thirty-three (33) and the South Half of the North Half of Section Thirty-three (33) and the South Half of the Northwest Quarter, the Southwest Quarter of the Northeast Quarter of Section Thirty-four (34) in Township 29 North of Range 85 West, the sum of No No Dollars.

On Parcel No. 5, being the Northeast Quarter of the Northwest Quarter of Section Twenty-five (25) in Township 29 North of Range 86 West, the sum of No Dollars.

All of which is by us respectfully submitted.

A. J. CUNNINGHAM,
JOHN WHITAKER,
Commissioners.

I do not concur in first and second divisions but concur in all of the third.

C. H. TOWNSEND, *Com.*

(The above report was filed June 16, 1909.)

43 EXHIBIT "F."

In the Circuit Court of the United States for the Eighth Judicial Circuit, District of Wyoming.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BOTHWELL COMPANY, a Corporation; ALBERT J. BOTHWELL and Margaretta Gray Bothwell, His Wife, and The Stockgrowers' National Bank of Cheyenne, Wyoming, a Corporation, Defendants.

Application for an Order Authorizing Plaintiff to Enter Upon, Use, and Occupy the Lands Involved in this Proceeding.

Comes now the plaintiff in said action, The United States of America by Timothy F. Burke, its attorney for the District of Wyoming,

and Gibson Clark, William A. Riner and John D. Clark, Special Assistants to said District Attorney, they acting herein by direction of the Attorney General of the United States at the request of plaintiff's Secretary of the Interior, and shows to the Court, that the water in the reservoir mentioned in plaintiff's petition filed herein on
44 the 10th day of May, 1909, is now so high that it covers and floods a large portion of the lands sought to be acquired by the plaintiff in this proceeding, and is gradually increasing in heighth, and covering more and more of said lands; that for the past two weeks the quantity of water flowing into said reservoir and impounded therein by the dam mentioned in said petition and known as the Parthfinder Dam, has been about sixteen thousand cubic feet per second of time, while the extreme capacity of the openings in the said dam and through which only can the heighth of the water in the reservoir be lowered, without pulling down and destroying the dam, will not exceed nine thousand cubic feet of water per second of time; that plaintiff is informed and believes that in the mountains in which the North Platte River rises, and in the country drained by said river, there is still a very large quantity of snow, the melting of which will keep the flow of water into said reservoir very much above the quantity which can be discharged through the openings in said dam, for many weeks to come, and the water in said reservoir will inevitably rise and cover and flood all of said lands.

Wherefore plaintiff prays for an order authorizing it to enter upon, use and occupy for reservoir purposes the lands described in its said petition and sought to be acquired in this proceeding, to-wit:

In Township 29 North of Range 84 West:—Lots 3 and 4 and Southeast Quarter of Southeast Quarter of Section Six (6); the Southwest Quarter of the Southeast Quarter, the South Half of the Southwest Quarter of Section Five (5), the Northeast Quarter of the Northeast Quarter of Section Seven (7), and the North Half of the Northwest Quarter and the Northwest Quarter of the Northeast Quarter of Section Eight (8);

45 In Township 29 North of Range 85 West:—The North Half of the North Half of the South Half of the Northwest Quarter and the Southwest Quarter of the Northeast Quarter of Section One (1); the North Half of Section Two (2); the North Half of Section Three (3); the South Half of the North Half and the North Half of the Northwest Quarter of Section Four (4); the Northeast Quarter of Section Five (5);

In Township 30 North of Range 84 West:—Lots 1, 2, 3 and 4 and the East Half of the Southwest Quarter of Section Thirty-one (31);

In Township 30 North of Range 85 West:—The South Half, the South Half of the Northeast Quarter, and the Northwest Quarter of the Northeast Quarter of Section Thirty-four (34); the Southwest Quarter of the Southeast Quarter of Section Twenty-seven (27); the South Half of Section Thirty-five (35);

Together with all water rights appurtenant to said lands; a leasehold interest from this date until April 8th, 1912, with a right of renewal for an additional period of five years in and to the South Half

of Section Thirty-six (36), together with all water rights appurtenant thereto.

TIMOTHY F. BURKE,
United States Attorney for the District of Wyoming.
GIBSON CLARK,
JOHN D. CLARK,
WILLIAM A. RINER,
Special Assistants to the United States Attorney.

46 STATE OF WYOMING,
County of Laramie, ss:

Gibson Clark, being first duly sworn on his oath says, that he is one of the attorneys for the plaintiff in the foregoing entitled action; that he has read the said application, knows the contents thereof and the matters therein stated are true as he verily believes.

GIBSON CLARK.

Subscribed and sworn to before me this 3rd day of July, A. D. 1909.

DANIEL W. GILL,
Notary Public.

Endorsements: 452 in the Circuit Court of the United States for the Eighth Judicial Circuit, District of Wyoming. The United States of America, Plaintiff, vs. The Bothwell Company, a corporation, Albert J. Bothwell and Margaretta Gray Bothwell, his wife, and The Stockgrowers National Bank of Cheyenne, Wyoming, a corporation, Defendants. Application for an order authorizing plaintiff to enter upon, use and occupy the lands involved in the proceeding. Filed July 3, 1909. Louis Kirk, clerk, by Charles J. Ohnhaus, deputy. Timothy F. Burke, U. S. Dist. Attorney, Gibson Clark, William A. Riner & John D. Clark, Special Assts. to U. S. Dist. Attorney, Attorneys for Plaintiff.

47 EXHIBIT "G."

In the Circuit Court of the United States for the Eighth Judicial Circuit, District of Wyoming.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BOTHWELL COMPANY, a Corporation; ALBERT J. BOTHWELL and Margaretta Gray Bothwell, His Wife, and The Stockgrowers' National Bank of Cheyenne, Wyoming, a Corporation, Defendants.

Order.

Now on this day come said parties, The United States of America by Timothy F. Burke its Attorney for the District of Wyoming, and

by Gibson Clark, William A. Riner and John D. Clark, Special Assistants to said District Attorney, they acting herein by express direction of the Attorney General of the United States at the request of plaintiff's Secretary of the Interior, and The Bothwell Company, a corporation, Albert J. Bothwell and The Stockgrowers National Bank of Cheyenne, Wyoming, a corporation, by John W. Lacey and Herbert V. Lacey their Attorneys, and this matter comes on
48 for hearing upon the application of the said plaintiff for an order authorizing it to enter upon, use, occupy and appropriate the lands described in plaintiff's petition filed herein and sought to be acquired in this proceeding, to-wit:

In Township 29 North of Range 84 West:—Lots 3 and 4 and Southeast Quarter of Southeast Quarter of Section Six (6); the Southeast Quarter of the Southeast Quarter, the South Half of the Southwest Quarter of Section Five (5), the Northeast Quarter of the Northeast Quarter of the Northeast Quarter of Section Seven (7), and the North Half of the Northwest Quarter and the Northwest Quarter of the Northeast Quarter of Section Eight (8);

In Township 29 North of Range 85 West:—The North Half of the North Half and the South Half of the Northwest Quarter and the Southwest Quarter of the Northeast Quarter of Section One (1); the North Half of Section Two (2); the North Half of Section Three (3); the South Half of the North Half and the North Half of the Northwest Quarter of Section Four (4); the Northeast Quarter of Section Five (5);

In Township 30 North of Range 84 West:—Lots 1, 2, 3 and 4 and the East Half of the Southwest Quarter of Section Thirty-one (31);

In Township 30 North of Range 85 West:—The South Half, the South Half of the Northeast Quarter, and the Northwest Quarter of the Northeast Quarter of Section Thirty-four (34); the Southwest Quarter of the Southeast Quarter of Section Twenty-seven (27); the South Half of Section Thirty-five (35);

Together with all water rights appurtenant to said lands; a leasehold interest from this date until April 8th, 1912, with a right of renewal for an additional period of five years in and to the
49 South Half of Section Thirty-six (36), together with all water rights appurtenant thereto, and the same is submitted to the court. And now, the court being fully advised in the matter doth grant said application and it is ordered, adjudged and decreed that the said plaintiff, The United States of America be, and it is hereby authorized and empowered to enter upon, use, occupy and appropriate all of the lands hereinbefore described, and that said plaintiff shall not hereafter dismiss these proceedings, but it shall be lawful for the defendants to conduct the same to a final conclusion if the same shall be delayed by the plaintiff.

Done this 3rd day of July, A. D. 1909.

JOHN A. RINER, *Judge.*

O. K.
J. W. L.

Endorsements: 452 in the Circuit Court of the United States for the Eighth Judicial Circuit, District of Wyoming. The United States of America, Plaintiff, vs. The Bothwell Company, a corporation, Albert J. Bothwell and Margaretta Gray Bothwell, his wife, and The Stockgrowers National Bank of Cheyenne, Wyoming, a corporation, Defendants. Order. Filed July 3, 1909. Louis Kirk, clerk, by Charles J. Ohnhaus, deputy. Timothy F. Burke, U. S. Dist. Attorney, Gibson Clark, William A. Riner & John D. Clark, Special Assts. to U. S. Dist. Atty., Attorneys for Plaintiff.

50 EXHIBIT "H."

Be it remembered, that on this twenty-eighth day of December, A. D. 1909 (the same being one of the regular judicial days of said term of said Court), the following proceedings (inter alia), were had and entered of record in said Court, to-wit:

In the Circuit Court of the United States for the Eighth Judicial Circuit, District of Wyoming.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BOTHWELL COMPANY, a Corporation; ALBERT J. BOTHWELL —-well, His Wife; and The Stockgrowers National Bank of Cheyenne, Wyoming, a Corporation, Defendants.

Judgment.

The above entitled cause coming on to be heard, and it appearing to the Court that the verdict of the jury heretofore rendered and filed in this cause on November 26th, A. D. 1909, has been approved and confirmed with respect to the lands therein first described, and also approved and confirmed with respect to the lands therein
51 last described known as the Kelly tract, subject to the future determination of the Court as to the ownership of said lands, such approval and confirmation being made by an order of this Court made December 7th, A. D. 1909, and it further appearing to the Court that the sum of One Hundred Eight Thousand Two Hundred Fifty Dollars ($108,250.00) has been deposited by the said plaintiff with the Clerk of this Court to the credit of the defendants, The Bothwell Company and The Stockgrowers National Bank of Cheyenne, Wyoming, and is now held by him subject to this order:

It is therefore, considered, ordered, adjudged and decreed that the following described lands, being the lands first described in said verdict, situate in the County of Natrona and State of Wyoming, to-wit:

In Township Twenty-nine (29) North, Range Eighty-four (84) West:—Lots three (3) and four (4) of Section Six (6);

In Township Twenty-nine (29) North, Range Eighty-five (85) West:—The North Half (N. ½) of the North Half (N. ½), and the South Half (S. ½) of the Northwest Quarter (N. W. ¼), and

the Southwest Quarter (S. W. ¼) of the Northeast Quarter (N. E. ¼) of Section One (1); the North Half (N. ½) of Section Two (2); the North Half (N. ½) of Section Three (3); the South Half (S. ½) of the North Half (N. ½), and the North Half (N. ½) of the Northwest Quarter (N. W. ¼) of Section Four (4); the Northeast Quarter (N. E. ¼) of Section Five (5);

In Township Thirty (30) North, Range Eighty-four (84) West:—Lots One (1), Two (2), Three (3) and Four (4), and the East Half (E. ½) of the Southwest Quarter (S. W. ¼ of Section Thirty-one (31);

52 In Township Thirty (30) North, Range Eighty-five (85) West:—The South Half (S. ½), the South Half (S. ½) of the Northeast Quarter (N. E. ¼), and the Northwest Quarter (N. W. ¼) of the Northeast Quarter (N. E. ¼) of Section Thirty-four (34); the Southwest Quarter (S. W. ¼) of the Southeast Quarter (S. E. ¼) of Section Twenty-seven (27); the South Half (S. ½) of Section Thirty-five (35);

Together with all water rights appurtenant to said lands; containing Two Thousand Five Hundred Seventy Three and Sixty-six Hundredths (2,573.66) acres according to the government survey; a lease-hold interest until April 8th, A. D. 1912, with the right of renewal for an additional period of five years in and to the South Half (S. ½) of Section Thirty-six (36), in said Township and Range, containing Three Hundred Twenty (320) acres, together with all water rights appurtenant thereto; be and the same are hereby ordered, adjudged and decreed to be the proprty in fee of the plaintiff, The United States of America, hereby confirming and ratifying each and all of the proceedings heretofore had in this action for the ascertainment of the compensation to be paid, together with the mode of making the same, and further ordering that this order be entered upon the records of this Court, and a certified copy thereof be furnished to the County Clerk and ex officio Register of Deeds in and for the County of Natrona, State of Wyoming, to be placed upon the proper records of his office.

And the plaintiff herein is hereby fully empowered to take possession of, hold and use all of said property hereinabove described for

53 the purposes of a storage reservoir in conjunction with and in furtherance of its reclamation project known as the "North Platte Project" as it may deem best, free and discharged of all liens, charges and incumbrances.

And the Clerk of this Court is hereby ordered, as soon as proper indorsements are obtained, to deposit in the Registry of the Circuit Court the funds now in his hands to the credit of this case, and upon the said defendants, The Bothwell Company and The Stockgrowers National Bank of Cheyenne, Wyoming, giving proper receipts of records therefor, to pay over to the said defendants, The Bothwell Company and The Stockgrowers National Bank of Cheyenne, Wyoming, or their counsel, as their respective interests may appear, the said sum of One Hundred Eight Thousand Two Hundred Fifty Dollars ($108,250.00) as their, the said defendants', full compensation for the taking, holding and using of the above described lands, so as aforesaid ordered, adjudged and decreed to the plaintiff herein.

Done in open Court this 28th day of December, A. D. 1909.
JOHN A. RINER, *Judge*

Endorsements: No. 452. In the Circuit Court of the United St for the Eighth Judicial Circuit, District of Wyoming. The Uni States of America, Plaintiff, vs. The Bothwell Company, a Corpo tion, Albert J. Bothwell and Margaretta Gray Bothwell, his wife, The Stockgrowers National Bank of Cheyenne, Wyoming, a Corpo tion, Defendants. Judgment. Filed December 28, 1909. Cha J. Ohnhaus, Clerk of the United States Circuit Court for the Dist of Wyoming.

54 UNITED STATES OF AMERICA,
District of Wyoming:

I, Charles J. Ohnhaus, Clerk of the Circuit Court of the Uni States for the District of Wyoming, do hereby certify the above foregoing to be a true, correct and complete transcript and copy the Judgment in case No. 452, The United States of Ameri Plaintiff, vs. The Bothwell Company, a Corporation, Albert J. Bo well and Margaretta Gray Bothwell, his wife, and The Stockgrow National Bank of Cheyenne, Wyoming, a corporation, entered in t Court on the twenty-eighth day of December, A. D. 1909.

Witness, my hand and the seal of said Court, at the City of Ch enne, in said District, this second day of March, A. D. 1910.
[SEAL.] CHARLES J. OHNHAUS, *Clerk*

UNITED STATES OF AMERICA,
District of Wyoming, ss:

I, John A. Riner, Judge of the United States District Court for District of Wyoming, do hereby certify that I am well acquain with the handwriting of Charles J. Ohnhaus, whose name is s scribed to the attached instrument of writing and that his signat thereto is genuine, and I do further certify that he was at the d thereof, December twenty-eighth, A. D. 1909, Clerk of the Circ Court of the United States for the District of Wyoming, duly pointed and qualified, and acting as such, and that his foregoing tificate is in due form.

In testimony to the above, I do hereunto set my hand, at Ch enne, in said District, this 3rd day of March, A. D. 1910.
JOHN A. RINER, *Judge*

55 III. *History of Further Proceedings.*

On April 8, 1916 the defendants filed a motion to allow the murrer, heretofore filed herein November 10, 1915, to the claima first amended petition to stand as the defendants' demurrer to claimants' second amended petition, filed herein on February 1916. This motion was allowed April 26, 1916.

IV. *Defendants' Motion to Strike Certain Parts from Second Amended Petition.*

Filed April 8, 1916.

Comes now the defendant, by its Attorney-General, and moves the court for an order herein striking from the claimants' Second amended petition each and every of the following parts thereof, on the ground that the matters so pleaded are irrelevant and immaterial to the cause of action attempted to be stated, or for any cause of action against this defendant; and to incorporate in such order as shall be entered herein sustaining this motion or any part of the same, a prohibition upon the claimants and each of them from introducing upon any hearing or hearings in this cause any testimony or evidence in support of the matter sought to be stricken from claimants' Second amended petition:

(*a*) Beginning in the 19th line of page 3 with the words "That said cattle consisted of" and ending with the last line on said
56 page 3 with the words "therein and contiguous thereto."

(*b*) Strike the words "and the pure-bred cattle and breeding business of your petitioners, as will be more fully hereinafter set forth" found in the 4th, 5th and 6th lines of page 7.

(*c*) Strike the words "and breeding business" found in the 13th line of page 7.

(*d*) Strike the words "and business" found in the 20th line of said page 7.

(*e*) Strike the words "the giving of a bond conditioned for the payment of such money, compensation and costs as should be finally assessed in the condemnation proceedings and" found in the 3rd, 4th, 5th, and 6th lines of page 9.

(*f*) Strike the words "and breeding business" found in the third line of page 10.

(*g*) Strike the words "and cattle business aforesaid" found in the 13th and 14th lines of said page 10.

(*h*) Strike the words "cattle business and pure-bred cattle as such pure-bred cattle" found in the 31st and 32d lines of page 11.

(*i*) Strike the words "the cattle and the business" found in the 8th line of page 12.

(*j*) Strike the entire paragraph numbered 12, beginning on page 12 and ending on page 13.

(*k*) Strike the last two paragraphs in the "Recapitula-
57 tion" found at the bottom of page 13 reading as follows:

"For the taking from your petitioners of the value of their said herds of cattle as pure-bred cattle....	$95,000.00
For the taking from your petitioners of their business as breeders and sellers of pure-bred cattle.....	20,000.00
Total	$125,000.00"

HUSTON THOMPSON,
Assistant Attorney General.

MARVIN FARRINGTON, *Attorney.*

V. *Argument and Submission of Defendants' Motion to Strike Certain Parts from the Second Amended Petition and Demurrer.*

On May 23, 1916 the defendants' motion to strike certain parts from second amended petition, and demurrer, were argued and submitted by Mr. Charles H. Merillat, for the claimants, and by Mr. Marvin Farrington, for the defendants.

58 VI. *Amendedment to Amended Petition, with Exhibits Attached.*

Filed by Leave of Court May 26, 1916.

Now come the petitioners by their attorneys Charles E. Breckons and Charles H. Merillat and by leave of court file this amendment to the Amended Petition filed herein February 5, 1916:

10½. That the petitioners by their attorneys in the endeavor to obtain a determination of the matter of damages to their personal property referred to in paragraph 10 of their amended petition filed a notice and application for leave to file a supplemental answer and likewise submitted therewith the proposed supplemental answer, which said papers are attached hereto marked Exhibits I, K and L and are prayed to be read as a part hereof the same as though incorporated herein. That the defendant filed a motion to strike out said supplemental answer, which said motion is attached hereto marked Exhibit M and is prayed to be read as a part hereof the same as though incorporated herein. That the petitioners by their attorneys thereafter duly endeavored to have the court permit the filing of said supplemental answer and resisted the motion to strike marked Exhibit M and petitioners further endeavored to have de-

59 termined in the aforesaid cause in the circuit court aforesaid the matter of their right to damages for personal property and the defendants opposed the same, and such proceedings were taken and had that the aforesaid circuit court ruled against petitioners and refused to consider the aforesaid supplemental answer and any and all testimony bearing on the question of the damages sustained by petitioners by reason of the taking of their personal property and business herein referred to by the defendants, said circuit court ruling at the instance of defendant that all such matters were cognizable only in the Court of Claims of the United States and not in the aforesaid condemnation proceedings, but petitioners have no copy of any formal order relating thereto if one were signed by the court.

ALBERT J. BOTHWELL,
THE BOTHWELL COMPANY,
Petitioners.

C. E. BRECKONS,
C. H. MERILLAT,
Attorneys.

60 EXHIBIT I.

In the Circuit Court of the United States for the Eighth Judicial District, District of Wyoming.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BOTHWELL COMPANY, a Corporation, ALBERT J. BOTHWELL and Margaretta Gray Bothwell, His Wife, and the Stock Growers National Bank of Cheyenne, Wyoming, a Corporation, Defendants.

Notice to said Plaintiff and Its Attorneys.

You will take notice that on Thursday, the 18th day of November, A. D. 1909, at ten o'clock A. M. of said day, or as soon thereafter as the same may be heard, the Defendant, the Bothwell Company, will make application to the said Court for leave to file a supplemental answer in said cause. Attached hereto is a copy of the proposed supplemental answer. The said proposed supplemental answer is only the answer as proposed, and the Defendant, the Bothwell Company, will change and remodel the same as may be required by the Court.

HERBERT V. LACEY,
JOHN W. LACEY,
Attorneys for Defendant, The Bothwell Company.

61 Service of the above notice, with copy of the proposed answer, by copy is confessed this 15th day of November, A. D. 1909.

GIBSON CLARK,
WILLIAM A. RINER,
JOHN W. CLARK,
Attorneys for Plaintiff.

EXHIBIT K.

In the Circuit Court of the United States for the Eighth Judicial District, District of Wyoming.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BOTHWELL COMPANY, a Corporation, ALBERT J. BOTHWELL and Margaretta Gray Bothwell, His Wife, and the Stock Growers National Bank of Cheyenne, Wyoming, a Corporation, Defendants.

Application for Leave to File Supplemental Answer by the Defendant The Bothwell Company.

Comes now the Defendant, the Bothwell Company, and hereby makes application for leave to file a Supplemental Answer in said

cause, and shows to the Court that the facts contained in said Supplemental Answer happened since the filing of its Original Answer in said cause, and that the Supplemental Answer is required in
62 order that complete justice may be done between the parties in said cause upon the trial of the same.

——— ———,
——— ———,
Attorneys for Defendant The Bothwell Company.

Exhibit L.

In the Circuit Court of the United States for the Eighth Judicial District, District of Wyoming.

The United States of America, Plaintiff,

vs.

The Bothwell Company, a Corporation, Albert J. Bothwell and Margaretta Gray Bothwell, His Wife, and the Stock Growers National Bank of Cheyenne, Wyoming, a Corporation, Defendants.

Supplemental Answer of the Defendant The Bothwell Company.

Comes now said defendant, the Bothwell Company, and for its supplemental answer in said cause, shows to the court that since its former answer the said plaintiff under a rule and order of this court took possession of the lands sought to be condemned as set forth in the petition in this cause, and covered the same with water which the plaintiff caused to be impounded and held back to such an extent and to such height that the greater part of the lands were covered.
63 And the defendant avers that prior to the taking of the said lands by the plaintiff, this defendant was conducting thereon the cattle business, and was breeding, herding and grazing a very high class of cattle thereon, such as were being used and would hereafter be used in improving the herds of cattle of divers stock raisers in the State of Wyoming and which cattle were highly profitable to this defendant in that large numbers thereof were from year to year sold by this defendant at certain seasons of the year to the stock growers of the State of Wyoming for breeding purposes. And defendant avers that there was no uniform or regular sale for such cattle during all seasons but that the sale was confined to particular seasons of the year. And this defendant further avers that for the use of its said herd of cattle it had provided on the said lands large amounts of hay which it had caused to be cut and placed in stacks upon said lands for the use of the said cattle during the winter of 1909-1910, which said hay so cut and stacked was at the time of the occurrences hereinafter set forth of large value, to wit, of the value of more than fifteen thousand dollars ($15,000). And this defendant avers that the act of the plaintiff in taking possession of the said land was to such extent without previous notice to this defendant that

the defendant was unable to remove or save the said hay, and that the act of the plaintiff in flooding the said lands destroyed the said hay and made the same entirely worthless.

And this defendant further avers that it had no other place upon the flooding of its said lands and destruction of its said hay where it might take its said cattle and preserve the same until such time as they could be sold as high-bred cattle, nor did it have hay or other means of feeding the same, but on the contrary that by reason of the taking and flooding of the said lands by the plaintiff it be-
64 came and was necessary for the defendant to sell the said cattle in open market for beef; that the price realized upon such sales was necessarily far below the value of the said cattle as a breeding herd for the purposes aforesaid; that the defendant was by reason of the facts aforesaid injured and damaged in its business by the taking of the said lands in a large sum, to wit, in the sum of more than thirty-five thousand dollars ($35,000), in addition to the value of the lands taken and damages to other lands not taken as set forth in the answer.

And this defendant avers that all and singular the acts of the plaintiff as aforesaid and the injuries and damages done to the defendant as aforesaid occurred since the last term of this court and since the answer was filed in this cause, and the defendant now prays that the damages on the matters aforesaid may be assessed and adjusted with the other damages in said cause.

HERBERT V. LACEY,
JOHN W. LACEY,
Attorneys for Defendant The Bothwell Company.

STATE OF WYOMING,
County of Laramie, ss:

John W. Lacey, being duly sworn on his oath according to law, deposes and says, that he is one of the attorneys for the defendant, The Bothwell Company, in the above entitled cause; that the said defendant is a corporation; that affiant has read the foregoing Supplemental Answer and verily believes that the facts herein set forth are true.

JOHN W. LACEY.

Subscribed in my presence and sworn to before me this 18th day of November, A. D. 1909.

LOUIS KIRK, *Clerk*,
By CHARLES J. OHMHOUS, *Deputy*.

65 Indorsed: In the Circuit Court of the United States, District of Wyoming. The United States of America, Plaintiff, vs. The Bothwell Company et al., Defendants. Notice, Application for leave to file Supplemental Answer and Supplemental Answer. Filed Nov. 18, 1909. Louis Kirk, Clerk. By Charles J. Ohmhous, Deputy. John W. Lacey, Herbert V. Lacey, Cheyenne, Wyo. For Defendant, The Bothwell Company.

Exhibit M.

In the Circuit Court of the United States for the Eighth Judicial District, District of Wyoming.

The United States of America, Plaintiff,

vs.

The Bothwell Company, a Corporation; Albert J. Bothwell and Margaretta Gray Bothwell, His Wife, and the Stock Growers National Bank of Cheyenne, Wyoming, a Corporation, Defendants.

Motion to Strike.

Comes now The United States of America by Timothy F. Burke its attorney, for the District of Wyoming, and by Gibson
66 Clark, William A. Riner and John D. Clark, Special Assistants to said United States District Attorney, and moves the court to strike from the Supplemental Answer of the defendant, The Bothwell Company, heretofore filed herein, the following portions thereof, to wit:

1. All of said supplemental answer contained in the first two paragraphs thereof and as grounds of said motion shows unto the court

1. That the above mentioned portions of the Supplemental Answer of the Bothwell Company, and each of them, are irrelevant and immaterial as to any issues before the court in this cause.

2. That the above mentioned portions of the supplemental answer of the Bothwell Company, and each of them, are wholly unauthorized and incapable of consideration in this court in this cause.

II.

Comes now the United States of America by Timothy F. Burke, its attorney for the District of Wyoming, and by Gibson Clark, William A. Riner and John D. Clark, Special Assistants to said United States District Attorney, and moves the court to strike from the Supplemental Answer of the defendant, The Bothwell Company, heretofore filed herein, the following portions thereof, to wit: 1. All of said Supplemental Answer contained in the last two paragraphs thereof and as grounds of said motion shows unto the court.

1. That the above mentioned portion of the supplemental answer of The Bothwell Company, and each of them, are irrelevant and immaterial as to any issues before this court in this cause.

2. That the above mentioned portions of the Supplemental
67 Answer of the Bothwell Company, and each of them, are wholly unauthorized and incapable of consideration in this court.

TIMOTHY F. BURKE,
United States District Attorney.
GIBSON CLARK,
WILLIAM A. RINER,
JOHN D. CLARK,
Special Assistants to the United States District Attorney.

68 VII. *Order of Court.*

Entered May 29, 1916.

This cause coming on to be heard was submitted upon the defendants' motion to strike from the petition as amended certain parts thereof relating to certain losses by plaintiffs alleged to be on account of the cattle and business of the plaintiffs as breeders and sellers of cattle, and separately was submitted upon a demurrer to the petition as amended; and the same having been duly considered by the court and the court being of opinion that the plaintiffs can not recover in this action for or on account of the alleged taking of cattle and the said business of petitioners, it is therefore ordered, adjudged and decreed that the said motion of the defendants to strike certain parts of the amended petition be and the same is hereby sustained except that part marked in the said motion paragraph "(*e'*)."

And having granted said motion the court proceeds to consider the demurrer to the petition as amended, and it is adjudged, ordered and decreed that the said demurrer be and the same is hereby overruled.

VIII. *Argument and Submission of Case.*

On November 12, 1918 the case was argued and submitted on merits by Mr. Charles H. Merillat, for the claimants, and by Mr. W. *F.* Norris, for the defendants.

69 IX. *Findings of Fact and Conclusion of Law.*

Entered December 2, 1918.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

Albert J. Bothwell and the Bothwell Company, a corporation owned and operated in the months of May, June and July, 1909, and for some years prior thereto a large ranch in the Sweetwater Valley in Wyoming, situated some 9 miles by river from a large dam known as the Pathfinder Dam, erected at the period in question by the United States for the purpose of impounding for irrigation purposes the waters of the Platte and Sweetwater Rivers. Bothwell personally owned all the stock in the Bothwell Company, but two shares of the stock were held in the names of employees of Bothwell so they might qualify as directors of the company. Bothwell owned all but two shares of the stock of the Bothwell Company.

II.

On May 10, 1909, the United States filed a petition in the United States Circuit Court for the District of Wyoming seeking condemnation of a part of the Bothwell land in connection with its Pathfinder Dam irrigation project, the petition alleging that the dam would be completed during the summer, would be 215 feet
70 in height above the bed rock of the Platte and Sweetwater Rivers and create a reservoir with a storage capacity of 1,025,000 acre feet of water. It alleged that all the lands described in the condemnation project would be submerged by the impounded waters when the dam was completed, and prayed an order granting the United States the immediate right to enter upon the lands and water rights sought to be condemned and an injunction against defendants' interference with such immediate entry.

By the Wyoming statute and practice (Wyoming Compiled Laws, sections 3874, 3884 and 3885), where right of condemnation existed the privilege was conferred at any stage of the condemnation proceedings to enter upon and appropriate immediately the property sought to be condemned by making application for that special purpose to the court or judge and giving a surety bond conditioned to pay such money compensation and costs as should be assessed against the condemning parties. It was further provided, however, that after giving bond and entering into possession the condemners could not abandon or dismiss the proceedings and that the owners, if delay occur, might take charge of the condemnation proceedings and press them to a final conclusion. The United States was not required to give bond, but it was under obligation, and so recognized, to obtain an order for immediate possession and definitely elect to abide the condemnation proceedings before it lawfully might
71 enter upon or take the land sought to be condemned. It did not elect to take immediate possession and to debar itself from dismissing the Bothwell condemnation proceedings until July 3, 1909. The claimants filed answers to the condemnation proceedings on May 31, 1909. On June 1, 1909, the United States took an order from the court, after due notice given, appointing commissioners to ascertain and determine the compensation to be paid claimants and others for lands described in the proceedings. The commissioners named on June 16, 1909, filed a report stating that they had met on June 11, 1909, and had viewed the lands to be condemned and had appraised the compensation to be paid therefor, said report further setting forth the amounts awarded.

On July 3, 1909, the United States filed in court an application praying for an order authorizing it to enter upon, use and occupy for reservoir purposes the land of claimants. The application set forth that the water "is now so high that it covers and floods a large portion of the lands sought to be acquired by the plaintiff in this proceeding." It stated that for the past two weeks the quantity of water impounded by the Pathfinder Dam "has been about sixteen thousand cubic feet per second of time, while the extreme capacity of

the openings in the said dam and through which only can the height of the water in the reservoir be lowered, without pulling down and destroying the dam, will not exceed nine thousand cubic feet of water per second of time." On the same day, July 3, 1909, the
72 court passed an order empowering the United States "to enter upon, use, occupy, and appropriate" claimants' lands, the order further providing "that said plaintiff shall not hereafter dismiss these proceedings, but it shall be lawful for the defendants to conduct the same to a final conclusion if the same shall be delayed by the plaintiff.

On December 28, 1909, a final judgment was entered for claimants for $108,250 as the value of their lands and water rights condemned. Claimants undertook in the proceedings to prove the value of hay taken, of the loss sustained by them as breeders of fancy cattle and of the depreciated value of their cattle, but the court ruled such evidence inadmissible as without the jurisdiction of the court, and limited the proceedings to the value of the land taken.

III.

At the time in May, 1909, that the United States first filed its condemnation proceedings against claimants' lands the claimants were conducting, as they had conducted for many years prior thereto, on the lands sought to be condemned a cattle-breeding ranch for high-grade and largely registered cattle. In connection with the ranch they raised large quantities of alfalfa hay and a smaller quantity of other hay to feed to their own stock. They were not engaged
73 in the business of selling hay. There was no market where hay could be bought or sold in the vicinity, and the value of the hay to Bothwell was as feed for his stock.

IV.

In June, 1909, an unanticipated flood due to rains and melting snows caused the water to rise rapidly in the reservoirs formed by the Pathfinder Dam and to back up on claimants' lands. Bothwell telephoned repeatedly the Government officials in charge at the Pathfinder Dam regarding conditions, urged that action be taken to permit a greater escape of the water, and that they come to his place and estimate his damage, that the water was creeping up on his haystacks and causing him damage. Prior to the water reaching claimants' haystacks claimants were informed by the Government officials they were anticipating that the water would begin to subside, and it was not until about the middle of June the Government officials knew claimants' lands would be flooded. The Government officials were greatly surprised themselves at the extent and rapidity of the rise in waters, and the middle of June 1909, erroneously believed the crisis of the flood had been reached. The waters reached their maximum heights the first few days in July and had receded materially by the middle of July, 1909.

74 It was not practicable for the claimants the middle of June to have moved their hay; they did not have the facilities or men for the purpose and the claimants had other and more important and immediate matters thrust upon them by the pressure of the rising waters. The flooding of claimants' lands was due wholly to the construction of the Pathfinder Dam.

V.

A considerable quantity of plaintiff's hay, of the value of $5,150, was washed away or otherwise destroyed by the flooding of the land as aforesaid.

Conclusion of Law.

Upon the facts found the court concludes, as matter of law, that the plaintiff is entitled to recover five thousand, one hundred and fifty dollars ($5,150), and judgment will be rendered accordingly.

75 X. *Judgment of the Court.*

Entered December 2, 1918.

At a Court of Claims held in the City of Washington on the Second day of December, A. D., 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the claimant-, and do order, adjudge and decree that Albert J. Bothwell and the Bothwell Company, as aforesaid, are entitled to recover and shall and have and recover of and from the defendants, the United States, the sum of Five Thousand One Hundred and Fifty Dollars ($5,150.00).

By THE COURT.

XI. *Claimants' Application for, and Allowance of, an Appeal.*

From the judgment rendered in the above-entitled cause on the 2d day of December, 1918 in favor of the claimants and from the order of the court rendered in the above-entitled cause on the 29th day of May 1916, striking out from claimants' petition certain parts thereof and especially that portion of petitioners' claims on account of the taking of the business as breeder of pure-bred cattle and for loss of value of pure bred cattle, claimants by their attorney on the 26th day of February, 1919, make application for and give notice of an appeal to the Supreme Court of the United States.

CHAS. H. MERILLAT,
Attorney for Claimants.

Filed February 26, 1919.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

March 3, 1919.

76 Court of Claims.

No. 33077.

ALBERT J. BOTHWELL and THE BOTHWELL COMPANY, a Corporation,

vs.

THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the orders of the court; of the argument and submission of case; of the findings of fact and conclusion of law; of the judgment of the court; of the claimants' application for, and allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Eleventh day of March, A. D., 1919.

[Seal Court of Claims.]

SAML. A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 27016. Court of Claims. Term No. 325. Albert J. Bothwell and The Bothwell Company, appellants, vs. The United States. Filed March 22d, 1919. File No. 27016.

FILED
APR 28 1920
JAMES D. MAHER,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 3[redacted]78

ALBERT J. BOTHWELL AND THE BOTHWELL COMPANY, A CORPORATION, APPELLANTS,

vs.

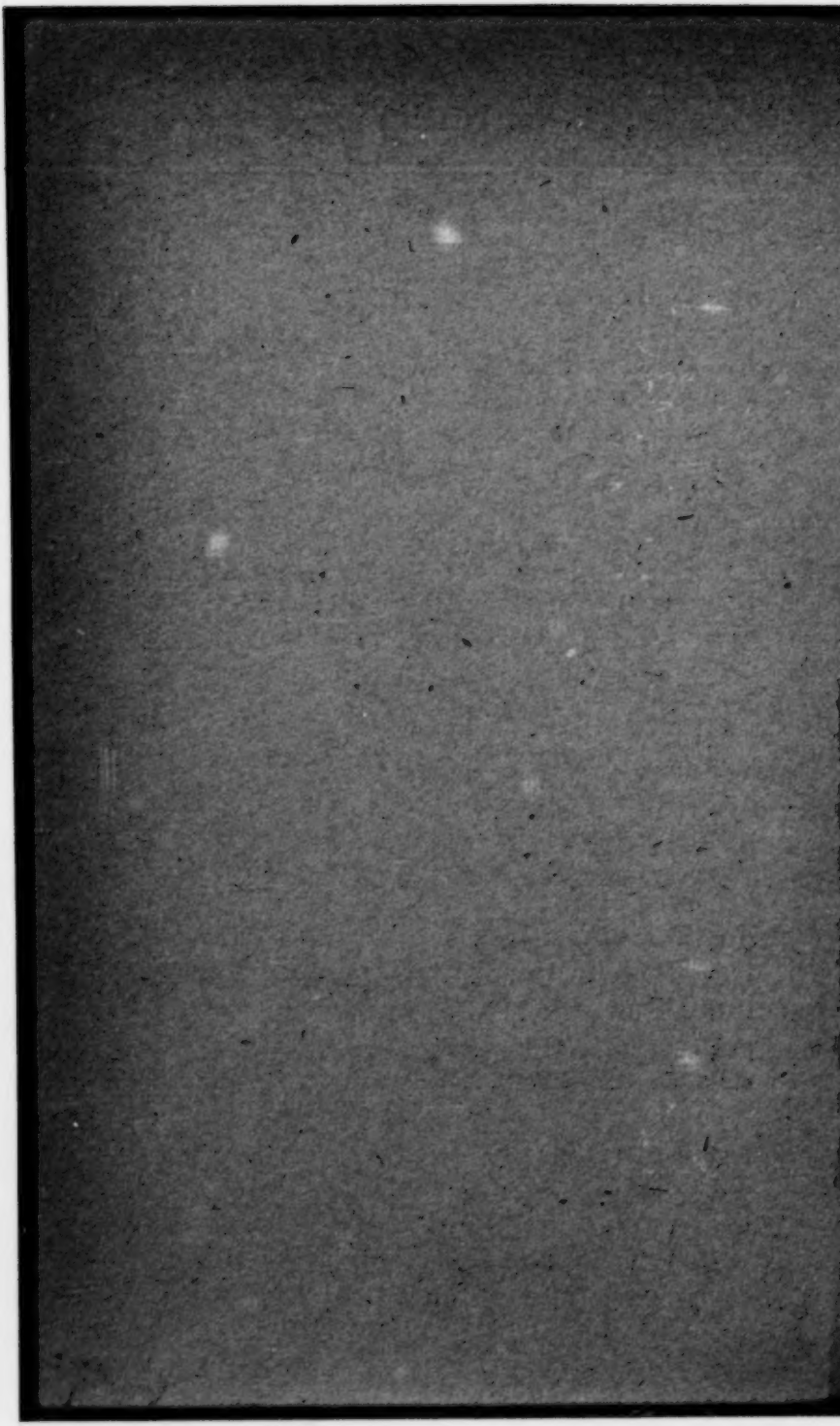
THE UNITED STATES OF AMERICA,

APPELLEES.

BRIEF OF APPELLANTS.

CHAS. H. MERILLAT,
Attorney for Claimant.

J. D. MILANS & SONS, 707 EIGHTH STREET N. W., WASHINGTON, D. C.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 325.

ALBERT J. BOTHWELL AND THE BOTHWELL COMPANY, A CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA,

APPELLEES.

BRIEF OF APPELLANTS.

This is an appeal by claimants from a judgment entered by the Court of Claims in Bothwell's favor in the sum of $5,150 for hay taken by the U. S. The appeal has been taken on the ground that the Court of Claims

erred in striking from claimants petition, refusing to permit evidence to be taken and filed and refusing to consider, in connection with the hay item, a claim Bothwell had against the United States for the taking of his cattle breeding business and compelling sale of his high-bred cattle as beef cattle by reason of construction of the Pathfinder Dam in Wyoming and the submergence thereby, by impounding of the waters, of the Bothwell ranch in June, 1909.

Bothwell for many years had conducted a ranch for the breeding of thoroughbred cattle in the Sweetwater Valley in Wyoming (p. 35). Some of the lands he owned in his own individual name and others in the name of the Bothwell Company, a corporation in which he owned all the stock (Findings of Fact, p. 35).

In May, 1909, the United States filed a petition to condemn a large part of Bothwell's lands as part of its Pathfinder Dam irrigation project. Bothwell had his herd of some 500 pure bred, registered cattle and an equal number of pure-bred but not registered cattle (p. 2) on lands owned by him some 9 miles from the dam and as a necessary incident to the breeding kept his purebred cattle in small groups or herds in separate enclosures with separate buildings and hay and grain therein.

When the United States in May 1909 filed its condemnation proceeding, under the Wyoming statutes and the laws of the United States it had a right immediately upon filing its condemnation proceedings to elect to take the lands and enter at once into possession, but if it did so elect it was compelled to abide the condemnation proceedings and push them to a conclusion speedily (p. 5). The law gave the owner the right to take charge of

and expedite the condemnation proceedings if, after having elected, the United States should be dilatory or should decide that it did not desire the lands.

The United States, though having filed the condemnation proceedings as stated, was uncertain whether it would or would not elect to condemn the lands, for the reason that it was in doubt whether the backing up of waters due to the Pathfinder Dam would extend as far back as Bothwell's lands, nine miles by river from the Pathfinder Dam.

There were unusual snows and rains that year, however, and in June waters began to back and rise rapidly on claimant's lands (Finding of Fact No. 4, p. 37).

"Bothwell telephoned repeatedly the government officials in charge at the Pathfinder Dam regarding conditions, urged that action be taken and permit a greater escape of the water, and that they come to his place and estimate his damage, that the water was creeping up on his haystacks and causing him damage. Prior to the water reaching claimant's haystacks, claimant was informed by the government officials they were anticipating that the water would begin to subside."

The water did not, however, subside but continued until in the first few days of July it reached its maximum height. "It was not practicable for the claimant to have moved his hay; he did not have the facilities or men for the purpose and the claimant had other and more important and immediate matters thrust upon him by the pressure of the rising waters. The flooding of claimant's lands was due wholly to the construction of the Pathfinder Dam."

It was not until July 3, 1909 (p. 36) that the government elected to take Bothwell's lands and thereby bound

itself in the condemnation proceedings under the statutes. The election, filed July 2, 1909, set forth that the water on Bothwell's lands "is now so high that it covers and floods a large portion of the lands sought to be acquired by the plaintiff in this proceeding." The court, in accordance with the statute, at once passed an order empowering the United States *"to enter upon,* use, occupy and appropriate" claimant's lands, with the statutory provision that the United States "shall not hereafter dismiss these proceedings," but "it shall be lawful for the defendants to conduct the same to a final conclusion if the same shall be delayed by the plaintiff."

In the condemnation proceedings, Bothwell sought (p. 32) to recover in addition to the value of his lands for the taking of his hay in the month of June by the flooding of his lands prior to the election to condemn the same, for the loss of his cattle breeding business in the same manner and for the loss sustained by him by being compelled to sell his cattle in open market for beef instead of as high-bred cattle, his answer averring that such cattle could only be sold at particular seasons of the year.

The United States Court in Wyoming struck out as irrelevant and immaterial to the condemnation proceedings this part of Bothwell's supplemental answer, holding that relief, if relief was to be afforded, must be given by the Court of Claims. Bothwell was awarded, therefore, $108,250 (p. 26) for the lands alone.

He filed suit in the Court of Claims on the items held irrelevant to the land condemnation. At the request of the court, in order that the matter might be passed upon on pleadings, the claimant set forth in the Court of Claims the entire record with exhibits of the condemna-

tion proceedings. On motion of the United States thereafter, the court struck from the petition all references to loss of value of the Bothwell cattle or loss of the cattle business, confining the claim purely to hay taken. The loss of the business and the lessened value of cattle, due to their being forced on the market and intermixed with one another, it treated as consequential damages, not recoverable. The matter stricken out will be found in paragraph 2, beginning at the 5th line on Page 2: "That said cattle consisted of" and extending to the end of the paragraph; the reference to cattle and the breeding business in paragraph 5, p. 4; the references to the breeding business and cattle business in paragraphs 8 and 9 on Page 5, and Page 6; likewise in Paragraph 10.

The Court also struck from the petition the entire paragraph 12, which related wholly to the foregoing cattle matters, including an averment that at the time the lands were flooded there were no means by which the claimant could have kept his purebred cattle separated and his cattle breeding business intact.

Assignment of Errors.

1. That the Court of Claims erred in deciding, as on demurrer, that claimant could not recover for the taking of his cattle breeding business by the United States.

2. That the Court of Claims erred in holding that the United States was not liable for the losses sustained by claimant by reason of forced intermixing of his cattle and being compelled to sell the same as common stock instead of pure-bred cattle.

3. That the Court of Claims erred in not holding that the lands and hay of claimant were taken from claim-

ant in June, 1909, and that the United States was liable, as for a taking, for all losses the reasonable and proximate result of flooding with water lands and hay upon which there was being conducted an established business.

Argument.

The case as made resolves itself into this legal proposition: Is the United States liable under the Fifth Amendment to the Constitution to compensate a party for loss of his business and for losses sustained in necessarily hasty forced sales of personal property making up his business where it "takes" the foregoing from him as an incident to "taking" his land and his hay thereon by means of flooding the land and the hay in the course of impounding waters through erection of a dam across a non-navigable stream, the lands as fenced and the hay being absolutely indispensable to conduct of the business, that of a high-class breeding establishment of pure-bred stock whose value is dependent on assurance of their pedigree.

Or is the party deprived and injured remitted for redress, if any, to the grace of Congress.

This it is submitted is the proposition to be resolved by the court, for while the flooding and taking of the land and hay occurred subsequent to the filing of the condemnation proceedings nevertheless they preceded exercise of the statutory right given to enter upon possession of the lands pending determination of the proceedings, and therefore it is as though there were no color of right to have entered upon and taken the lands and hay.

That the backing up of water on property, real or personal, by the United States, and the destruction or appropriation of the property consequent thereon, is a "taking" of the property within the meaning of the Fifth Amendment to the Constitution and gives the Court of Claims and this court jurisdiction to award compensation as upon an implied contract, is no longer open to question.

U. S. vs. Lynah, 188 U. S., 445.
Pumpelly vs. Green Bay Co., 13 Wall., 166.
Horstman vs. U. S., 48 C. C., 426.
Johnson vs. U. S., 8 C. C., 243.
Huffmire vs. Brooklyn, 162 U. S., 584.

As said by the Court of Claims in the Horstman case, *supra*, "the question is whether property has been taken or not, and not *how* it has been taken."

Any interference with, or impairment of, the ordinary and proper use of property by its owner is a taking, as where his well is dried up.

United States vs. Alexander, 148 U. S., 186.
Pumpelly vs. Green Bay Co., *supra*.

The instant case is not within the principle of Bedford vs. The U. S., 192 U. S., 217, or the Jackson, Hughes and other Mississippi river overflow cases, for in those cases the overflows were not the direct consequence of the construction of Federal works which changed the normal existing course of the stream and led to injuries that might have been anticipated by any owner as liable to happen at any time by changes in the course of the river or by governmental regulation of the river as part of its national control over navigable waters.

Here it was a deliberate backing up of impounded non-navigable waters on the land of a private citizen; a taking of the land and whatever was thereon without the lawful election of condemnation that would have called for immediate removal of the personal property and business thereon.

The general rule is that the title to property taken by condemnation and also the right to make entry upon the land proposed to be taken and take possession of the same does not begin until payment or tender of compensation and damages.

Lewis on Eminent Domain, Secs. 678-81.
Balto. R. Co. vs. Nesbit, 19 How. (U. S.).
Sweet vs. Rechel, 159 U. S., 380.
Mason City vs. Boynton, 204 U. S., 570.

The exception is that the right of entry and of possession in advance of actual condemnation may be conferred, provided—but only provided—there be adequate and certain provision made to insure compensation to the owner by statute, there being no precedent right of entry and possession except as the statutes confer it.

U. S. vs. Russell, 13, Wall., 623.
U. S. vs. Lynah, *supra.*
Sweet vs. Rechel, *supra.*

But, such right is an exception and must be strictly pursued as to procedure and the citizen has the right to presume there will be no illegal invasion of his right of property. The right to peaceful and undisturbed possession of property until lawfully disturbed and to just and adequate compensation if disturbed is a sacred right jealously guarded by the courts. So far does this re-

quirement of strict compliance with the statutory procedure go that as said in Cherokee Nation vs. Southern Kansas R. Co., 135 U. S., 641: "An owner is entitled to a reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed," and the court held, that where the statute provided for immediate entry pending termination of condemnation proceedings it was not sufficient that the condemning railroad offered to pay into court double the amount of the award made by the referee. The *offer to pay* is not a compliance with the statute. The amount required to be deposited must be actually paid into court before the company *can rightfully enter* upon the lands sought to be condemned or proceed with the construction of its road."

The necessity for strict protection of constitutional rights was thus set forth in Boyd vs. U. S., 116 U. S., 616:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance."

The United States had no right whatsoever upon the Bothwell lands until July 3, 1909, when for the first time it elected, in accordance with law, as it well knew, to exercise the right of immediate entry and thereby debar itself from abandoning its condemnation proceedings

and is liable therefore for the full consequences of its unlawful entry and "taking" of the personal property that was upon the lands.

The Act of June 17, 1902 (32 Stats., 388), specifically provided that in condemnation of land (p. 40) "the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in accordance with such laws" —being the laws of the State in which the lands were situated. The Wyoming statutes in force at the time expressly, for the protection of the citizen, required that the right of entry and immediate possession pending conclusion of the condemnation should be conditioned on the condemning party making application to, and obtaining an order from, the court giving it the right to "enter upon and appropriate the property in question"—after which the statute declared such condemning party "cannot abandon or dismiss the proceedings."

The United States, as the record of the condemnation proceedings show, clearly recognized the Wyoming procedure as binding upon it, but, while entering on the Bothwell lands in advance, elected to refrain from taking the required judicial order until after it had "taken" the land and the hay from Bothwell by prematurely and unlawfully entering upon and assuming dominion over his premises and invading his land, his pastures and his fences, mixing his cattle and forcing him out of the breeding business he had built up.

Bothwell was under not the slightest obligation to assume there would be an illegal invasion of his premises. The findings show he did not know they would be invaded in season to have protected himself. He telephoned the officials in charge of the Pathfinder dam and repeatedly received assurances lulling him into a sense of

security. And when the water did rise and flood his land, his fences and his haystacks he was without facilities at short notice to remove the hay and cattle, keep the cattle separated and continue his business.

The law is settled that an owner "may recover compensation for the inconvenience which results to him while the condemnation proceedings are pending."

Shoemaker vs. U. S., 147 U. S., 282-320.

A *fortiori* he may recover if, while the condemnation proceedings are pending, but prior to a lawful right to enter upon possession, the condemning party actually does make an unlawful entry and proceeds to "take" not only the land sought to be condemned, but in this instance certain other things, namely, personal property, hay, upon the land unlawfully entered upon. In such a case the illegal entry makes the "taking" the same as though there had been a forcible taking, *vi et armis*, of claimants' property.

As to the *quantum* of damages, the rule of law is that it must be full and complete, such as will justly return to the citizen the full pecuniary value to him of that which he has lost.

District of Columbia vs. Cemetery, 5 D. C. Apps., 479-514.

In condemnation proceedings land to the value of $45,000 was taken and the jury found the remaining land was damaged by the taking to the extent of approximately $6,000. The lower court disallowed this $6,000 damage. The Court of Appeals said:

> "We think there was error in this. The inherent sovereignity to take private property for public use has no limitation upon it but that of making *just compensation for that of which it deprives the citizen. The compensation must be co-extensive with that which is taken, otherwise it would not be just compensation.* That which is taken is that of which the owner is deprived. * * * It has been held by the Supreme Court of the United States that it is not necessary that property should be absolutely taken, in order to give the right for compensation under the constitutional guarantee, and that serious interruption to the common and necessary use of property is the equivalent of taking within the meaning of the constitutional provisions."
>
> Hetzel vs. B. & O. Railroad Company, 169 U. S., 26.

In this case the action in part was for the recovery of damages to property based upon the persistent and unlawful use of a public street adjacent to the property by the Railroad Company.

Held that such damages should be awarded as "on the judgment of fair men directly and naturally resulted in the injury for which suit is brought. This is the rule which obtains in civil actions for damages. They have their foundation in the idea of just compensation for wrongs done."

The court quoted with approval Justice Peckham's opinion in United States Trust Company vs. O'Brien, 143 New York, 284, that:

> "The rule of damages should not be upon the form of the action. In all civil actions the law gives or endeavors to give a just indemnity for the wrong which has been done the plaintiff, and

whether the act was of the kind designated as a tort or one consisting of a breach of a contract is on the question of damages an irrelevant inquiry. As said in Baker vs. Drake, 53 New York 211-220, the inquiry is, what is adequate indemnity to the party injured, and the answer cannot be affected by the form of action in which he seeks his remedy."

The court below in the argument preceding its striking out of the claim for loss of business and loss of value of the intermixed herds of high grade cattle intimated that Bothwell should have moved out upon the United States filing its condemnation proceedings and, in any event, upon his ascertaining the waters were coming upon his lands. It is submitted that under the findings of fact it is clear the court below erred, and that its early error is manifest from its findings.

Had the United States when it filed its condemnation proceedings also filed an election to proceed it would have been Bothwell's folly not in an orderly manner to have moved away, separate his high bred stock and have sold same as separated or resumed business if another suitable location were obtainable. If no such location were obtainable it would have been *damnum absque injuria* and the injury would have been a lawful incident of the condemnation, for it is well settled recovery cannot be had for personal property upon land condemned.

But when the injured was occasioned as it was by a taking of lands and hay irregularly and without resort to the forms of law it was an injury against which claimant could not have guarded himself and was under no obligation to guard himself, and hence is entitled to full redress.

Suppose notwithstanding the failure of the United States to elect to condemn his land and notwithstanding the repeated assurances to him that his land would not be flooded and hence would not be needed Bothwell had in fact moved his business and sold his high grade stock as such and then the condemnation election had not been made and the crest of the flood waters had passed without seriously encroaching on his lands would Bothwell have had any redress if thereafter he sought redress for the threat that had caused him to vacate to his injury. Would he not have been told it was not his own folly not to have waited as was his lawful right, privilege and even duty?

The efficient cause of the loss of Bothwell's business and his high grade stock, in value, was the actual taking in advance of statutory election to take of Bothwell's lands and hay and the efficient cause is the proximate cause. Ins. Co. vs. Boon, 95 U. S., 117-31.

In the lower court the United States relied upon Gibbons vs. U. S., 8 Wall 274, to the effect that the United States cannot be made responsible for the torts, the unauthorized acts of its officers and agents. It is submitted the case is not here applicable. The United States did authorize the building of the Pathfinder dam, the impounding of the waters, and it is this which caused the damage. The condemnation was but a consequent held in abeyance to await the fact whether the rising waters would submerge the Bothwell premises, entirely or nearly so and relieve the government by purchase of the lands from suit for their taking.

Respectfully submitted,

CHAS. H. MERILLAT,

Attorney for Claimant.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

ALBERT J. BOTHWELL AND THE BOTHWELL Company, a Corporation, Appellants, v. THE UNITED STATES. } No. 78.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This action, in the Court of Claims, was to recover for property alleged to have been taken by the United States on account of the erection of the Pathfinder Dam across the North Platte River in Natrona County, Wyoming.

This dam was erected by the Government in carrying out certain irrigation works known as the North Platte project, pursuant to the act of Congress approved June 17, 1902. (32 Stat. 389, c. 1093, sec. 7.)

It becoming apparent, in the progress of the work, that the waters impounded by the dam would submerge the lands of appellants the Government, on

May 10, 1909, filed in the Circuit Court for the Eighth Judicial Circuit, District of Wyoming, a bill of complaint (Rec., 8–12) to appropriate the said lands. The height of the dam was 215 feet. It created a reservoir with a storage capacity of 1,025,000 acre-feet of water (Finding II, Rec., 36) and would cause the water to rise 200 feet or more above the then normal level.

The property of appellants sought to be appropriated consisted of a large ranch in the Sweetwater Valley, in Wyoming, about 12 miles above the Pathfinder Dam. Upon this ranch appellants were operating the business of raising pure-bred Hereford cattle, registered and unregistered.

The exact date when the dam was completed does not appear in the record. It is stated in the bill of complaint (Rec. 9) "that said dam will be completed during the early summer of the present year," and it appears from the findings of fact that the dam was completed, so as to accomplish the purpose of impounding waters, some considerable time before the damages occurred to appellants' property. The appropriation proceeding was regularly prosecuted and finally determined on the 28th day of December, 1909, when full compensation to appellants for the taking, holding, and using of their lands was awarded by judgment of the court. (Rec. 26–27.) While this proceeding in condemnation was pending, and in the latter part of June, 1909, "an unanticipated flood" (Finding IV, Rec. 37) caused the waters in the reservoir created by the dam to rise so

rapidly that appellants' lands were submerged and a considerable quantity of hay thereon destroyed. It is alleged in the petition (Rec. 7) that on account of this rapid rise of the waters in the reservoir appellants were compelled to drive their cattle hurriedly from their ranch and to dispose of them as ordinary cattle in the open market, thus incurring a loss for which, as well as for the destruction of their hay and damage to their business, the Government is liable. The final paragraph of the judgment of the United States Circuit Court (Rec. 27) recites that the amount found due and ordered paid to the appellants was "the said defendant's full compensation for the taking, holding, and using of the above described lands."

The petition in the Court of Claims prays compensation for damages for the identical items presented to the Circuit Court in the condemnation proceedings, namely (Rec. 7):

For the taking of hay of your petitioners	$10,000
For the taking from your petitioners of the value of their said herds of cattle, as pure-bred cattle	95,000
For the taking from your petitioners of the business as breeders and sellers of pure-bred cattle	20,000
Total	125,000

The Government in the Court of Claims filed a motion to strike from the amended petition the parts relating to losses on account of the cattle and business of the appellants as breeders, and also demurred to the petition. The Court of Claims granted the motion, holding that the claimants could not recover on account of the alleged taking of cattle and alleged

taking of its business, but overruled the demurrer to the petition, thus allowing the action to stand as a claim for the value of the hay destroyed. Upon this claim it entered judgment in favor of the appellants for $5,150, from which they appealed, bringing before this court the whole case.

There is thus presented a case in which the United States, proceeding under authoritative law and in the manner prescribed by law, has appropriated real property for a necessary public use and has had determined and paid to the former owners full compensation therefor; and the owners being dissatisfied with the rejection or disallowance of certain claims for compensation made by them in that proceeding and having allowed that judgment to become final, bring an independent action in another court to again recover on account of the same taking.

BRIEF OF ARGUMENT.

The Government's position is that the Court of Claims was correct in declining to consider the claims relative to damage to business and loss on account of the cattle, and it further contends that said court was entirely without jurisdiction to enter judgment against the Government for destruction of the hay; that is, that the Court of Claims had no jurisdiction of any of the claims presented for the following reasons:

1. Because all proper questions as to the compensation allowable to appellants were finally disposed

of in the Circuit Court. This applies to each of the claims now asserted.

2. No court has jurisdiction to consider, as against the United States, claims sounding in tort. This applies to the claims on account of the cattle and the hay. The argument will be directed to the separate claims.

I.

There could be no recovery against the United States in the Court of Claims for the alleged taking of the business of appellants.

This claim was stricken from the petition on motion. (Rec. 35.) It was asserted in the petition (Rec. 7) that by submersion of their lands the Government took from appellants the value of their "lands, improvements, personal property, and herds as a going business" to their loss in the sum of $20,000.

If appellants' business had any value for which they could be compensated as for a taking, that value existed because of the relation of the business to the land, and was therefore a proper element to be considered in the appropriation proceedings in the Circuit Court. (*Monongahela Navigation Company* v. *The United States*, 148 U. S. 312, 328, 329; *United States* v. *Chandler-Dunbar Company*, 229 U. S. 53, 76, 77.)

This claim has no connection with the damages caused by the unanticipated flood. It was, of course, known to the Government as well as to appellants

when the condemnation suit was filed that the submerging of appellants' land would put an end to the business of raising cattle thereon, and therefore if that business had any value incident to the land for which the appellants could be compensated, this was certainly a question to be adjudicated in that proceeding and the value fixed as of the day when the proceeding was begun. (*United States* v. *Chandler-Dunbar Company*, 229 U. S. 53, 76.)

The record, moreover, shows that this claim was actually presented in the condemnation cases. The Court of Claims, in the last paragraph of its findings of fact No. II, p. 37, includes a legal conclusion that the evidence to support this contention was excluded by the Circuit Court on jurisdictional grounds. There is an allegation to this effect in the amendment to the amended petition filed in the Court of Claims (Rec. 30), but nothing else to show upon what basis this conclusion was reached by the Court of Claims. However, the claim was considered and rejected by the Circuit Court and that ends it, as the judgment of the Circuit Court was allowed to become final. The court may well have based its decision on the ground that the claim was for merely consequential damages or that the damages were too remote or for any other reason but it did dispose of the claim and it can not be again adjudicated. (*The Haytian Republic*, 154 U. S. 118, 128.)

II.

There could be no recovery against the United States in the Court of Claims of compensation for loss incurred by the forced selling of appellants' cattle.

The gist of this claim is that on account of the rapid submergence of appellants' lands, caused by an unanticipated flood, appellants were compelled to drive the cattle hurriedly from the ranch and sell them as common cattle and that the price realized at such sale was $95,000 less than the actual value of the cattle; for which loss it claims compensation. The mere statement of the claim excludes the element necessary for jurisdiction in the Court of Claims, namely, the element of contract. As stated in *United States* v. *Great Falls Mfg. Co.* (112 U. S. 645, 656)—

> The law will imply a promise to make the required compensation where property to which the Government asserts no title is taken pursuant to an act of Congress as private property to be applied to public uses.

It is clear that the Government had no intention of taking or using appellants' cattle and that it did not take or use them. Furthermore, it is impossible to conceive how it would be necessary for the Government to appropriate fine cattle in erecting a dam and reservoir, or how such result could follow as a necessary consequence of such public work. As stated in *Hijo* v. *United States* (194 U. S. 315, 322)—

> There is no element of contract in the case; for nothing was done by the United States,

nor anything said by any of its officers, from which could be implied an agreement or obligation to pay for the use of the plaintiff's vessel. See also *Juragua Iron Co.* v. *United States* 212 U. S. 297.

This claim was also presented to the circuit court and rejected. Upon what ground it does not appear, nor is it material. If appellants were entitled to compensation for their loss on the theory that the extra value of the cattle was taken for public use, then the claim was undoubtedly cognizable by the circuit court and was concluded by the judgment therein. If that court did not have jurisdiction of the claim, then the Court of Claims has none. This is decisive of this claim, but it is also apparent from the record that whatever loss appellants suffered is attributable to their own negligence. Immediately upon the Government filing its petition in appropriation, if not before, appellants were put upon notice that within a short time its lands would be submerged. It was thereupon their duty to remove the cattle, as well as all other movable personal property, from their lands; that they delayed to do so until an unexpected flood made it necessary to remove the cattle so precipitately that appellants were compelled to dispose of them in an open market is certainly not an anticipated or in any way necessary result of the Government's work. The loss or damage is primarily attributable to appellants' own neglect. In addition it is purely remote and consequential and in no way attributable to the work of the Government.

The petition is totally insufficient in its statement of facts to constitute a cause of action against the Government on this ground. As this claim could only be asserted as an action for recovery on account of a tort, the argument in the following subdivision of this brief is applicable.

III.

The Court of Claims erred in rendering judgment against the United States on account of the destruction of appellants' hay.

It appears from the pleadings and findings of fact that prior to and at the time of the submersion of appellants' lands they had thereon a considerable quantity of hay used for the purpose of feeding their stock. (Finding III, Rec. 37.) The Court of Claims finds that though the condemnation proceeding had been begun and was in progress, the Government, at the time of the submersion of appellants' lands, had not obtained an order for immediate possession under the Wyoming Statutes, and therefore its entry upon the lands in June, 1909, by submerging the same, was unlawful. (Finding II, Rec. 36.) Finding IV (Rec. 37, 38) is as follows:

> In June, 1909, an unanticipated flood due to rains and melting snows caused the water to rise rapidly in the reservoirs formed by the Pathfinder Dam and to back up on claimants' lands. Bothwell telephoned repeatedly the Government officials in charge at the Pathfinder Dam regarding conditions, urged that action be taken to permit a greater escape of the water, and that they come to his place and

estimate his damage; that the water was creeping up on his haystacks and causing him damage. Prior to the water reaching claimants' haystacks claimants were informed by the Government officials they were anticipating that the water would begin to subside, and it was not until about the middle of June the Government officials knew claimants' lands would be flooded. The Government officials were greatly surprised themselves at the extent and rapidity of the rise in waters, and the middle of June 1909, erroneously believed the crisis of the flood had been reached. The waters reached their maximum heights the first few days in July and had receded materially by the middle of July, 1909.

It was not practicable for the claimants the middle of June to have moved their hay; they did not have the facilities or men for the purpose and the claimants had other and more important and immediate matters thrust upon them by the pressure of the rising waters. The flooding of claimants' lands was due wholly to the construction of the Pathfinder Dam.

The Government had no intention of taking appellants' hay; it was not needed and it was not necessary or usable in the prosecution of the public works and it is doubtful if it could appropriate the same in the constitutional sense had it so desired.

If the United States at the time of this submergence had no right of entry upon appellants' real estate, then in the commission of a trespass it destroyed personal property of appellants, which property was

in no way needed or taken or used by the Government. The finding last quoted shows in effect that the Government had no intention of invading the real estate of appellants at this time, certainly not the remotest intention of taking or using its hay. Therefore, any liability of the Government is concededly tortious and such liability it does not admit. (*Peabody* v. *United States*, 231 U. S. 530–539.)

There is no element of implied contract. If no condemnation suit had been brought, then, of course, under the authority of the *United States* v. *Lynah* (188 U.S. 445) and similar cases, the Government would be liable to compensate the owners of the real estate which was submerged for the value of the same because the necessary result of building the dam and impounding the waters was to take this real estate from the owner for the use of the Government, the ownership of the appellants being recognized an implied contract on the part of the Government to pay for what it has taken arises. But just and full compensation has been made in the manner prescribed by law for all of the property of the appellants necessary to be taken and used and intended by the Government to be taken and used. There is no more liability on the part of the Government for the destruction of this hay than there would have been had the property of appellants been situate below the dam and either on account of negligence of the Government in construction or by an unexpected flood the dam had broken and appellants' hay had been destroyed by the rush of the waters.

Finding IV of the Court of Claims may perhaps be susceptible to the deduction that appellants' hay was destroyed because the officials in charge of the Pathfinder Dam neglected to provide for larger escape of the water, or, by representations that their lands would not be submerged, lured appellants into a sense of security so that they did not take the proper steps to remove the hay before the flood came. In either event, the Government would not be liable for the acts of its agents if the result of their action or neglect was the destruction of appellants' property. (*Langford* v. *United States*, 101 U. S. 341; *Bigby* v. *United States*, 188 U. S. 400.) The Court of Claims finds in the last paragraph of Finding IV "the flooding of claimant's lands was due wholly to the construction of the Pathfinder Dam." This we admit is true as to the permanent flooding of the land; but, as to the unanticipated flood which destroyed the hay, it might well be argued, if it were necessary, that this flooding and the destruction caused thereby not only lacked every element of the constitutional taking of private property but was the destruction of private property by fortuitous or unforseen accident, liability on account of which only exists in cases of express contract or actionable negligence. (*Viterbo* v. *Friedlander*, 120 U. S. 707, 733.) Contractual liability by implication in such cases can not exist.

The argument on behalf of appellants and the judgment of the Court of Claims seem to be based upon the theory that the failure of the Government to

obtain a formal order of the Court in the condemnation case allowing immediate entry, prior to the submergence of appellants' lands, made the Government entry thereon unlawful and therefore the Government is liable for the destruction of the hay. This in fact, is the statement in the petition, brief and findings of fact. The mere statement extinguishes any contractual obligation of the United States for unlawful entry and injury must necessarily be tortious. It is doubtful if this contention and finding will bear scrutiny. Application for an order of immediate entry is made by the last paragraph of the petition in the condemnation suit. (Rec. 12.) The applicable law is contained in sections 3884, 3885, ch. 262 of the Wyoming statute (L. 1909, ch. 96, secs. 3, 4). Section 3884 requires for entry of possession that application be made for that purpose and a proper bond given for the payment of compensation. Section 3885 provides that on compliance with section 3884 the right of immediate entry may be given at any time during the proceedings and that the proceedings may not thereafter be abandoned.

The Government is not required to give a bond. (R. S. 1001; *United States* v. *O'Neill*, 198 Fed. 677, 683.) It had already, in its petition, made the application for immediate entry and therefore it is doubtful in view of these statutes whether the formal order of the court granting the application for immediate entry could add anything to the right to so immediately enter authorized upon compliance with the statutes

as by entry it was foreclosed from abandoning the proceeding. However, we consider it unnecessary to discuss this feature of the case for the reason that if the entry was lawful then the Circuit Court acquired jurisdiction to award all compensation that could be awarded in this case. It could not award compensation for tortious taking; neither can the Court of Claims. If the entry was unlawful then the damage resulting was purely tortious.

SUMMARY.

The case as disclosed by the pleadings and findings of fact may be viewed in three possible ways:

First, that the submergence of appellants' lands in June, 1909, constituted an unlawful entry thereon. If this is true, then the act was a trespass and the Government is not liable in an action in damages therefor.

Second, that at the date of the submergence in June, 1909, the right to enter the appellants' lands had been obtained by the Government and all that remained was to fix in the case then pending just compensation due for such entry; under this view either (*a*) there was no liability at all on the part of the Government, since the appellants were under obligation to remove their hay, the United States being entitled to flood the land and having evinced no intention to take the hay and there being no necessity for taking the same, or (*b*) it was negligence on the part of the agents of the United States to fail to warn the appellants of the time when the land would

be flooded, so as to give them opportunity to remove their property.

Third, the United States having obtained the right to enter upon the lands, then everything done by it on or in connection with the land was proper subject for adjudication in the condemnation proceedings, and as the items upon which the present claim were based were presented in the Circuit Court in the condemnation proceedings, their adjudication by that court is final.

If appellants had the right to recover for the destruction of their business of cattle raising and for their hay, then the Circuit Court was in error in refusing recovery; and appellants should have proceeded directly to have that error corrected. The error, if any were committed, can not be reviewed in the Court of Claims. If appellants were not entitled to recover upon those claims in the Circuit Court it could only be because the action, if any action at all existed, sounded in tort and therefore, the Court of Claims is equally without jurisdiction.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims denying recovery on account of the alleged taking of the cattle and business of appellants should be affirmed and the judgment against the United States for the value of the hay destroyed should be reversed.

FRANK DAVIS, JR.,
Assistant Attorney General.

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BOTHWELL ET AL. v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 78. Argued November 9, 1920.—Decided December 6, 1920.

The contract implied from a taking by the Government is a contract to pay for the property actually taken. P. 222.

Where construction of a Government dam flooded private land, destroyed the owner's hay there stored and forced him to remove and sell his cattle, *held*, assuming an implied obligation to pay for the hay, there was none to pay the loss due to forced sale of the cattle and destruction of business. *Id.*

To review a judgment of the Court of Claims, the Government must appeal; it cannot attack it on the claimant's appeal. P. 223.

54 Ct. Clms. 300, affirmed.

THE case is stated in the opinion.

Mr. Charles H. Merillat for appellants.

Mr. Assistant Attorney General Davis for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Appellants owned and utilized in their business of stock raising a large tract of land lying in Sweetwater Valley, Wyoming. In June, 1909, much hay was stored upon the land and a thousand head of cattle were there confined. Under the Reclamation Act of June 17, 1902, c. 1093, § 7, 32 Stat. 389, the United States constructed the Pathfinder Dam. This arrested the flood waters and caused inundation of appellants' lands. The hay was destroyed and it became necessary to remove the animals and sell them at prices below their fair value.

Proceedings to condemn the land were instituted by the appellee, in the United States Circuit Court for Wyoming, before the overflow. It is said the right to enter was not acquired until thereafter. The value of the land was ascertained and paid, but the court denied appellants' claim for the hay, and for loss consequent upon forced sale of the cattle and destruction of the business. No appeal was taken. The present suit was instituted to recover for the items so disallowed. The court below gave judgment for value of the hay only, and the cause is here upon claimants' appeal.

Certainly appellants' position in respect of the items in question is no better than it would have been if no condemnation proceedings had been instituted. In the circumstances supposed there might have been a recovery "for what actually has been taken, upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of

justice and the terms of the Fifth Amendment so require." *United States* v. *Cress*, 243 U. S. 316, 329. But nothing could have been recovered for destruction of business or loss sustained through enforced sale of the cattle. There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation. We need not consider the effect of the judgment in the condemnation proceedings.

It is suggested that although the United States did not appeal they may now contest the judgment upon the ground that there was no contractual obligation to make compensation for the hay. "Without an appeal, a party will not be heard in an appellate court to question the correctness of the decree of the trial court." *Cherokee Nation* v. *Blackfeather*, 155 U. S. 218, 221.

The judgment below is

Affirmed.